18-609

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~250~~ 141

ANDREW J. DAVIS, PLAINTIFF IN ERROR,

vs.

JOHN BILSLAND.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED FEBRUARY 23, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 350.

ANDREW J. DAVIS, PLAINTIFF IN ERROR,

vs.

JOHN BILSLAND.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

INDEX.

	Original.	Print.
Complaint	2	1
Exhibit "A," (attached to complaint)	11	4
Exhibit "C," (attached to complaint)	14	5
Demurrer of Germain	18	6
Answer of A. J. Davis	19	6
Exhibit "A," (attached to answer of Davis)	22	8
Order overruling Germain's demurrer	29	10
Answer of defendant Germain	30	10
Replication to answer of Germain	36	12
Motion to consolidate, &c., (Germain's)	38	12
Order overruling last motions	40	13
Amendments to complaint	40	13
Testimony of plaintiff John Bilsland	43	14
Instrument conveying lien from McKillican to plaintiff	44	14
Testimony of W. D. McKillican	47	15
Findings of the court	48	16
Plaintiff's motion for judgment and foreclosure of lien	51	17
Order overruling Germain's objections to findings and decree	52	17
Decree	53	17
Stipulation waiving notice of motion for new trial	57	19
Stipulation extending time to file statement and for new trial	59	19
Motion and specification of errors for new trial	60	20
Order overruling motion for new trial	62	20
Notice of appeal	64	21
Order fixing amount of bond on appeal	65	21
Undertaking on appeal	66	22
Defendant Davis' notice of appeal	69	23
Defendant Davis' undertaking on appeal	70	23

	Original.	Print.
PROCEEDINGS IN THE SUPREME COURT ON APPEAL OF ACTION.		
Cause on for hearing	73	24
Judgment on appeal	74	25
Opinion	78	25
Dissent of Chief Justice Warren	100	31
Writ of error	102	31
Citation	108	33
Bond	109	35
Approval of bond	112	35
Clerk's certificate	113	36

1 TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

In the district court 3rd judicial district in and for the county and Territory aforesaid.

JOHN BILSLAND, PLAINTIFF,
vs.
G. JULES GERMAIN ET AL., DEFENDANTS.

Be it remembered that among the records & proceedings had and done in said cause, are the following, to wit:

On the 25th day of November, 1869, said plaintiff filed the following complaint, with the clerk of said court, to wit:

In the district court of the third judicial district of the Territory of Montana, within and for the county of Lewis & Clarke.

JOHN BILSLAND, PLAINTIFF,
vs.
2 G. JULES GERMAIN, CHARLES DAHLER, Andrew J. Davis, Henry Wyttenbach, (Barnes & Arnold) Senior & McBirney, Mason & Duke, John Barnett, W. W. Arnold, R. S. Hale, Parchen & Paynter, William P. Wilder, John A. Murphy, Samuel Davenport, John Shively, Daniel B. Dressler, E. L. Curry, and Thomas Conrad, A. G. Clarke and John Curtin, composing the firm of Clark, Conrad, and Curtin, defendants.

The complaint of the above-named plaintiff respectfully shows to this honorable court, that on about the 16th day of July, A. D. 1869, the defendant, G. Jules Germain, contracted and agreed with this plaintiff to pay him, the plaintiff, the sum of $\$12\frac{50}{100}$ dollars per day for each & every day the plaintiff should serve and work for the defendant, G. Jules Germain, in and about the construction & erection of the here-
3 inafter described building & premises; that in pursuance of said agreement & contract, this plaintiff did work for the defendant last aforesaid in and about the construction of said building, during the months of July, August, September, October, & November, A. D. 1869, $87\frac{3}{4}$ days, and that said defendant became & was indebted to this plaintiff therefor on the 10th day of November aforesaid, in the the sum of $1{,}096\frac{87\frac{1}{2}}{100}$ dollars. That no part thereof has been paid except the sum of 354 dollars paid previous to the filing of the hereinafter mentioned statement of account and notice of lien, & there is now due this plaintiff therefor the sum of $742\frac{87}{100}$ dollars besides interest. That the following is a correct description of the building & premises upon which such work was done as aforesaid, to wit, a building known as the International Hotel, situate in the town of Helena, in the county of Lewis & Clarke, in the Territory of Montana, on Main and Bridge streets in said city of Helena. and more particularly described as
4 follows: Lots number 3 & 4, in block No. 21, fronting 25 f't 9 in. on Main street, & 90 feet deep, & lot No. 34 in block number 21, or that portion of said lot conveyed to the said G. Jules Germain, by J. T. Parkinson & W'm H. Parkinson & wife, by deed dated July 12th,

1869, and recorded in book "H" of deeds, page 144, of the Lewis & Clarke County, Montana Territory, records, in accordance with the official plat of the said town of Helena on file in the office of the recorder of said county. That during the time of performing said work and services, said defendant was the proprietor and owner of said building and premises, and that the last of said work was done on the 10th day of November, A. D. 1869. That within sixty days after the completion of said work and services, to wit, on the 17th day of November, 1869, this plaintiff filed with the recorder of said county, a notice of lien upon said premises, for the amount due him from the defendant for such work as aforesaid, which notice contained a true and just account of the demands due the plaintiff over and above all credits, and contained a correct description of the property to be charged with the lien, and verified by oath, a copy of which notice of lien is hereunto annexed and marked Exhibit A and made a part of this complaint. That no proceedings have been had either at law or otherwise to recover said sum secured by said lien.

This complainant further shows that said building was commenced on or about the 15th day of May, A. D. 1869.

This complainant further shows that six months have not elapsed since the date of the filing of said notice of lien & statement of account.

This complainant further shows that the defendants, Barnes & Arnold, Senior & McBirney, Mason & Duke, D. P. Lake, Barnes & Arnold, R. S. Hale, Parchen and Paynter, William P. Wilder, John A. Murphy, Samuel Davenport, John Shively, and Daniel Dressler, claim liens upon said premises, which liens are filed thereon previous to the lien of this plaintiff; and that the defendants, Charles Dahler, Andrew J. Davis, Henry Wyttenbach, and Clarke, Conrad & Curtin, have or claim some interest in a lien upon said encumbered premises, or some part thereof, which interests, if any, have accrued subsequent to the lien of this plaintiff aforesaid.

For a second and further cause of action this complainant represents that the defendant, G. Jules Germain, the owner and proprietor of the hereinafter referred to and described premises, on or about the 6th day of May, 1869, contracted and agreed with one W. D. McKillican, to pay the said McKillican 12 dollars for every day the said McKillican would serve and work for said defendant, as foreman in and about the erection of a certain building in Helena City, in said county of Lewis & Clark, in said Territory, known as the International Hotel, a more full description of which is contained in a copy of notice of lien hereto annexed, and marked Exhibit "C," and made a part of this complaint; that under said contract and agreement the said McKillican did and performed 164 days' work & service as aforesaid, in the construction of said building. Whereby the said defendant, G. Jules Germain became indebted to the said McKillican in the sum of 2,050 dollars; that no part thereof has ever been paid except the sum of 807 $\frac{50}{100}$ dollars paid in money and board previous to the time of filing the hereinafter mentioned notice of lien.

That afterwards on the 17th day of November, 1869, the said McKillican filed in the office of the recorder of said county a notice of lien against the property hereinafter referred to and correctly described in Exhibit "C," aforesaid, hereto annexed and made a part of this complaint.

That said notice of lien was filed within sixty days after all of said services and work was done, and contained a just & true account of the

demands due said McKillican from said Germain, after deducting all credits, and also contained a correct description of the property, to be charged with the lien, and verified by affidavit, a copy whereof is
8 hereunto annexed marked Exhibit "C," & referred to as part of this complaint; that six months have not elapsed since the filing of said lien, and that no proceedings at law, or otherwise, have been instituted to recover the indebtedness aforesaid; that the defendants Charles Dahler, Andrew J. Davis, Henry Wyttenbach & Clark, Conrad & Curtin, claim some liens upon, or claims to, or interest in the said encumbered property, but that their claims, liens, or interests, if any, accrued subsequent to the said lien of the said W. D. McKillican; that the said McKillican, on the 20th day of November, while said defendant was indebted to him in said sum of $1,242\frac{50}{100}$ dollars as aforesaid, by deed in writing, under his seal, in consideration of the sum of $800 dollars, in hand paid by this plaintiff, sold, transferred, assigned, and set over to this plaintiff, with full power to collect the same, the lien mentioned in this cause of action, as well as the said indebtedness secured thereby, which transfer and assignment was in writing, under the hand and seal of said McKillican, and filed for record, in the
9 office of the clerk of said county, on the 20th day of November, A. D. 1869; that no part of said indebtedness has been paid, & that the defendant G. Jules Germain, is now justly indebted to this plaintiff by reason of the premises in the sum of $1,242\frac{50}{100}$ dollars.

Wherefore this plaintiff prays judgment against said defendant, G. Jules Germain, in the amount of the several sums so due him as aforesaid, amounting in all to the sum of $1,967\frac{51}{100}$ dollars, with interest thereon from & after the date of filing said notices of lien, to wit, from the 17th day of November, 1869, as well as for his costs in this suit; and that it be adjudged and decreed by this court, that the defendants, G. Jules Germain, Charles Dahler, Andrew J. Davis, Henry Wyttenbach, and the firm of Clark, Conrad & Curtin, and all persons whomsoever claiming right, title, demand, or lien, by, through, or under them, or either of them subsequent to the commencement of this action, be forever barred and foreclosed of all right, title, claim, lien, and equity of redemption in or to said encumbered premises or any part
10 thereof; and that said premises be decreed to be sold according to law, and the moneys arising from such sale be brought into court; that the plaintiff may be paid the amount due as aforesaid, with interest up to the time of said payment, as well as the costs & expenses of this action, so far as the moneys properly applicable thereto will pay the same, & that the said G. Jules Germain be adjudged to pay the deficiency, if any there be, after paying all of said moneys so applicable thereto; & that the plaintiff may have such other and further relief as to this court may seem meet and equitable.

JOHNSTON & LOWRY,
Attorneys for Plaintiff.

TERRITORY OF MONTANA,
County of Lewis & Clark, ss:

John Bilsland, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint and knows the contents thereof, and that
11 he has reason to believe & does believe that the matters as stated therein are true.

JOHN BILSLAND.

Subscribed & sworn to before me this November 24th, 1869.

A. J. EDWARDS,
Justice of the Peace.

Exhibit A, referred to in the hereunto-annexed complaint as a part thereof.

HELENA, *November 10th*, 1869.

G. Jules Germain to John Bilsland, Dr.

For work done as carpenter on the International Hotel in Helena City, M. T., 82¾ days work, at $12.50 per day		$1,096 87½
By board ac	$254 00	
" cash	$100	
		$354 00
Balance due John Bilsland		$742 87½

John Bilsland, being first duly sworn, states that the above
12 account is a just, true, & correct account of the demand due him from G. Jules Germain, after allowing all legal credits & offsets; that said indebtedness was created under & by express contract with the said Jules Germain, the owner & proprietor of the grounds and of the building upon which this affiant performed such labor, as per contract aforesaid; that the said building is known as the International Hotel, and is situated on Main and Bridge street in the town of Helena, Lewis and Clarke County, Montana Territory, and more particularly described as follows, to wit: Lots numbers three (3) & four, (4,) in block number twenty-one, (21,) fronting forty-five feet and nine inches on Main street, and ninety (90) feet deep; and lot number thirty-four, (34,) in block number twenty-one, (21,) or that portion of said lot thirty-four (34) in block number twenty-one (21) conveyed to him the said G. Jules Germain, by J. T. Parkinson, and W'm H. Parkinson & wife, by deed dated July 12th, A. D. 1869, and recorded in book " H " of deeds,
13 page 144, Lewis & Clark County, M. T., records, and in accordance with the official plat of the said town of Helena on file at the office of the county recorder of Lewis and Clark County, M. T.; that the labor performed by this affiant upon said building, and as per contract aforesaid, was commenced on the 16th day of July, A. D. 1869, and completed on November 10th, 1869; that the whole amount due this affiant from the said Germain, for such labor, is $742.87½; that it is the intention of this affiant to claim a mechanic's lien on the premises herein described, and for the amount above mentioned, and this indenture shall be notice to all persons that such lien is claimed.

JOHN BILSLAND.

Subscribed & sworn before me this 17th day of November, A. D. 1869.

[SEAL.]

W. B. MORRISON,
County Clerk.

14 HELENA, M. T.

Jack Bilsland to G. Jules Germain.

Nov. 15, 1869.—To 2 m'ths, 8 W., 1 day board, c'y	254 00
Cash	100 00
	$354 00

HELENA CITY, *Nov. 10th*, 1869.

J. G. GERMAIN:

Pay the bearer, John Bilsland, 87¾ day work, at $12.50 in currency per day.

Amount in currency, $1,096.87½.

W. D. McKILLICAN.

Exhibit C, referred to in the hereunto-annexed complaint as a part thereo

HELENA CITY, *Nov. 13th, A. D.*, 1869.

G. Jules Germain to W. D. McKillican, Dr:

15	For work as foreman on the International Hotel, situate in Helena, M. T., 164 days, at $12 50/100, c'y, per day.	$2,050 00

Contra.

By board	$425 00	
" cash	382 50	
		807 50
Bal'c' due McKillican		$1,242 50

W. D. McKillican, being first duly sworn, states that the above account is a just, true, and correct account of the demand due and owing from G. Jules Germain to this affiant after allowing all legal credits and offsets; that the said indebtedness was created under and by express contract with the said G. Jules Germain, the owner and proprietor of the ground and of the building upon which this affiant performed such labor as per contract aforesaid; that the said building is known as the International Hotel, and situated on Main & Bridge streets in Helena City, Montana Territory, and more particularly described as follows, to wit: Lots numbers three (3) and four, (4,) in block number twenty-one, (21,) fronting forty-five feet nine inches on
16 Main street and running back ninety (90) feet, and lot number thirty-four, (34,) in block number twenty-one, (21,) or that portion of lot 34 in said block 21 conveyed to him the said G. Jules Germain by J. T. Parkinson and W'm H. Parkinson and wife, by deed dated July 12th, A. D. 1869, and recorded in book "H" of deeds, page 544, of Lewis and Clarke County, M. T., records, and also in accordance with the official plat of the town of Helena on file in the office of the county recorder of Lewis and Clarke County, M. T.; that the labor performed by this affiant aforesaid was commenced on the 8th day of May, A. D. 1869, a[illegible] finished on the 13th day of November, A. D. 1869; that the whole amount due this affiant for such labor from the said Germain is $1,242.50, and that it is the intention of this affiant to claim mechanics' lien on the premises herein described for the amount above mentioned, and this indenture shall be a notice to all persons of such claim.

17 W. D. McKILLICAN.

Subscribed and sworn to before me this 17th day of November, A. D. 1869.

[SEAL.] W. B. MORRISON,
Co. Clerk.

HELENA, M. T., *Nov. 15th*, 1869.

W. D. McKillican to G. Jules Germain.

To board	$425 00
" cash	382 80
C'y	$807 80

HELENA CITY, *Nov. 13th*, A. D. 1869.

G. Jules Germain to W. D. McKillican, Dr.

For 146 days' work as foreman on the International Hotel @ $12.50 per day $2,050 00,

18 And on the fourth (4th) day of December, 1869, said defendant filed his demurrer to said complaint, which said demurrer was in words and figures as follows, to wit:

JOHN BILSLAND, PLAINTIFF
vs.
G. JULES GERMAIN ET AL., DEFENDANTS.

In the Territorial district court, 3rd judicial district, Lewis and Clarke County, Montana Territory.

Now comes the above defendant, by his attorneys Woolfolk & Toole, and demurs to the complaint of the plaintiff for the following reasons, to wit:

I. The said complaint does not state facts sufficient to constitute a cause of action.

II. The said complaint is ambiguous, unintelligible & uncertain.

WOOLFOLK & TOOLE,
Att'ys for Germain.

Service of copy of the foregoing demurrer duly made this 4th day of December, A. D. 1869.

JOHNSTON & LOWRY,
Pl'ff's Att'ys.

19 And on the eighth (8th) day of January, 1870, the defendant A. J. Davis, filed his answer to said complaint with the clerk of said court, which is in words and figures as follows, to wit:

In the district court, third judicial district, county of Lewis & Clark Territory of Montana.

JOHN BILSLAND
vs.
G. JULES GERMAIN, ANDREW J. DAVIS, ET AL.

Now comes the above-named defendant, Andrew J. Davis, by his attorneys, Chumasero & Chadwick, & for answer to the complaint of the plaintiff herein, denies that the interest of this defendant in the premises

described in the said complaint accrued subsequent to the lien or interest of the said plaintiff; either for labor done & performed by the said plaintiff, or by the said W. D. McKillican, & claimed by the said plaintiff by assignment to him.

20 And the said defendant, on information and belief, denies that on the 24th day of November, 1869, or at any other time, for the consideration of the sum of eight hundred dollars, or any sum whatever, the said McKillican sold, assigned, and transfer'ed the said demand against the said G. Jules Germain & the said lien on the said described premises to the said plaintiff.

And the said defendant further answering avers, that on the 9th day of June, A. D. 1869, this defendant advanced and loaned to the said G. Jules Germain the sum of six thousand seven hundred & ninety-two dollars, and that on the day and year last aforesaid the said Germain executed to this defendant his promissory note & mortgage, securing the said note; that the said mortgage was given upon the property described in the said complaint, as will more fully appear from said mortgage, a copy of which is hereto annexed marked "Exhibit A," and made a part of this answer.

And that on the day and year last aforesaid the said mortgage was duly filed for record, and recorded in the county recorder's office

21 in and for said county of Lewis & Clarke, in book "E C" of mortgages, on pages 107, 108, 109, & 110.

And the said defendant avers that the said sum of money, in the said promissory note & mortgage mentioned, was loaned and advanced by this defendant & obtained by the said G. Jules Germain, for the purpose of paying off and discharging all demands, liens, and claims against the said premises, and to further improve the same by erecting certain buildings thereupon, and defendant alleges, upon information & belief, that the said money was so used.

That this defendant is still the owner of said note & mortgage, and that no part of the same has been paid, or the interest thereupon.

And the defendant avers that his interest in the said premises accrued and attached therein & thereto by virtue of the said mortgage and the recordation thereof, long prior to any interest of the said plaintiff, and is paramount thereto.

Wherefore the said defendant demands judgment against the said plaintiff for his costs of suit, and for such other or further relief

22 in the premises as may be just and equitable.

CHUMASERO & CHADWICK,
Atty's for Defendant, Davis.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

A. J. Davis, being first duly sworn, deposes & says that he is the defendant named in the foregoing answer; that he has heard the same read and knows the contents thereof; that he has reason to believe and does believe the matters as therein stated to be true.

A. J. DAVIS.

Subscribed & sworn before me this 8th day of Jan'y, 1870.

W. F. CHADWICK,
Notary Public.

EXHIBIT A.

This indenture made and entered into this ninth day of June, in the year of our Lord eighteen hundred and sixty-nine, by and between G. Jules Germain, of the city of Helena, county of Lewis & Clarke,
23 and Territory of Montana, party of the first part, & Andrew J. Davis, of the county of Gallatin, and Territory aforesaid, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of six thousand seven hundred & ninety-two dollars, lawful money of the United States of America, to him in hand paid, by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, & sold, and by these presents do grant, bargain, and sell unto him, the said party of the second part, & to his heirs and assigns forever, the following-described property, situated, lying, and being in the city of Helena, county of Lewis and Clarke, and Territory of Montana, to wit: Lot No. thirty-one, (31,) in block No. one, (1,) being twenty-two feet front on West Main street, and seventy feet deep, bounded northerly by lot No. thirty-two, (32,) in said block, and owned by Lea Montgomery; easterly by West Main street; southerly by lot No. thirty, owned by James W. Whitlatch, and westerly by Clore street.

Also twenty-five feet, more or less, fronting on Bridge street,
24 fifty-eight feet, more or less, deep, being the premises formerly occupied by Mrs. Twogood as a millinary store, and adjoining the premises belonging to Marcus Listner.

Also lot No. four, (4,) in block number twenty-one, (21,) being twenty-four feet front on Main street, and ninety feet deep. Said lot beginning at a point on the east line of said Main street, twenty-five feet in a southerly direction from the corner of Wood and Main streets, and running thence in an easterly direction ninety feet to the westerly line of lot No. seven, (7,) in said block, and owned by one Nickols; thence southerly along the westerly line of said lot No. seven (7,) thirty-four feet to the northerly line of said lot No. thirty-four, (34,) in said block, and owned by J. T. and W. H. Parkinson; thence westerly along the northerly line of said lot No. thirty-four, (34,) twenty-nine (29) feet to the easterly line of lot (3) in said block, and owned by J. L. Holtzman; thence northerly along the easterly line of said lot three, (3,) ten (10) feet; thence westerly along the northerly line of said lot three, (3,) sixty-one (61) feet to the easterly line of Main street; thence northerly
25 along the easterly line of said Main street twenty-four (24) feet to the place of beginning. And also, that piece or parcel of ground known as lot No. three (3) in block number twenty-one, (21,) fronting on Main street, commencing at the southwest corner of said lot, and to extend north on said Main street eighteen feet, and extending back the full width of the front forty-seven feet, the said last mentioned property being the same conveyed or leased to the said party of the first part, by S. L. Holtzman, and upon which the party of the first part is now erecting & constructing a hotel: To have and to hold the said lots, pieces, or parcels of ground, together with all the improvements thereon, or hereafter to be erected or constructed upon the same, with the privileges and appurtenances thereunto belonging, unto him the said party of the second part, his heirs, and assigns forever: Provided always, and these presents are upon this express condition, that whereas, the said party ot the first part has this day made, executed, & delivered unto the said party of the second part, his certain promissory note for the
26 sum of six thousand seven hundred and ninety-two dollars, due

and payable eighteen months from the date thereof, with interest thereon from the ninth day of September, A. D. 1869, at the rate of four per cent. per month, payable monthly, that is to say, said first month's interest to be paid on the ninth day of October, A. D. 1869, and each and every month thereafter. And in the event the said party of the first part shall fail to pay the said interest as aforesaid, the same shall draw like interest as the principal until paid. Now, if the said party of the first part, shall well and truly pay said note according to the tenor and effect thereof, then these presents to become null, void, & of no effect; otherwise the same to be & remain in full force and effect.

And it is moreover hereby agreed, that it shall be lawful for, and the said party of the second part is hereby authorized & empowered, to pay off and discharge at maturity all taxes or assessments, liens or other incumbrances now subsisting, or hereafter to be levied or imposed
27 upon the property hereinafter described, & in the event that said party of the first part shall fail to insure said property with some good & reliable insurance company, then the said party of the second part, his heirs, administrators, or assigns are hereby authorized & empowered to insure the same, and any amount so owed or paid by him for the purpose aforesaid shall be considered as, and is hereby, secured by these presents, together with interest on the amount so advanced as aforesaid, at the rate of four per cent. per month, which said amount & interest shall be paid by the said party of the first part, or deducted from the proceeds of sales of the property hereinbefore described.

And it is moreover further understood that in the event a suit for foreclosure of these presents shall be instituted, the costs and expenses incurred in the same, and sale upon any decree or judgment thereunder, as well as attorney or counsel fees at the rate of ten per cent. upon the amount which may be found due upon said decree or judgment as principal and interest shall also be deducted from the proceeds of such
28 sale as paid by the party of the first part as the case may be.

And the residue, if any, to be paid over to the said party of the first part, his creditors or assigns.

In witness whereof the said party of the first part has hereunto set his hand and seal the day & year first above written.

[SEAL.] G. JULES GERMAIN.

[$8.00 int. rev. st'p.]

Signed & sealed in presence of—
J. E. OWINGS.

TERRITORY OF MONTANA,
County of Lewis & Clarke:

Be it remembered, that on the 9th day of June, A. D. 1869, before me, James E. Owings, personally appeared G. Jules German, who is personally known to me to be the person described in & who executed the foregoing instrument of writing as a party thereto, and acknowledged that he executed the same freely & voluntarily & for the uses & purposes therein mentioned.

In witness whereof I have hereunto set my hand & notarial seal of office at Helena City, M. T., the day and year last aforesaid.

29 JAMES E. OWINGS,
Notary Public.

Filed & recorded June 9th, 1869, at 5 o'clock p. m.
W. B. MORRISON,
County Recorder.
Per D. B. PERKINS, *Deputy.*

And on the 16th day of March, 1870, said demurrer, being considered by the court, was overruled, in words and figures as follows, to wit:

JOHN BILSLAND
vs.
G. JULES GERMAIN ET. AL.

This cause coming on to be heard upon the demur'er of the defendant Germain, it is ordered that the said demur'er be overruled, to which ruling the said defendant, by his attorneys, then and there excepted, and asked & obtained leave to answer by the 19th day of March, 1870.

30 And on the 19th day of March, A. D. 1870, the defendant Germain filed his answer to said complaint, which is in the words and figures following, to wit:

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

In the district court, 3rd judicial district, in and for the county and Territory aforesaid.

JOHN BILSLAND, PL'FF,
vs.
G. JULES GERMAIN ET AL, DEFENDANTS.

Now comes G. Jules Germain, one of the defendants in the above-entitled cause, by Woolfolk & Toole, his attorneys, and for his separate answer to plaintiff's complaint admits that on or about the 16th day of July, A. D. 1869, this defendant contracted with said plaintiff to work & labor for him upon the premises described in said complaint, but denies that he contracted or agreed to pay said plaintiff therefor
31 the sum of twelve dollars and fifty cents per day; denies that said plaintiff rendered services for this defendant in pursuance of any such contract, or that said plaintiff performed eighty-seven & three-fourths days' labor for this defendant; denies that on the 10th day of November, 1869, this defendant was, or now is, or at any other time became, indebted to said plaintiff in the sum of ten hundred & ninety-six dollars & eighty-seven & one-half cents. Admits that he paid said plaintiff the sum of three hundred & fifty-four dollars, but avers that said payment was made upon the indebtedness hereinafter mentioned. Denies that said plaintiff ever filed an account, and notice of lien, containing a true & just account of the amount due and owing from this defendant to said plaintiff; denies that any lien has been filed upon said property by said plaintiff as by law provided; denies that this defendant at any time made any such contract as is set out in said complaint, with said plaintiff, or that he is indebted to said plaintiff in any sum whatever under or by virtue of such contract, or
32 that said plaintiff is entitled to recover of this defendant any sum whatever in this action.

This defendant, for further answer, states that, on or about the date mentioned in said complaint, he did contract with said plaintiff to work and render services for him upon said premises at the rate of ten dollars per day, in gold dust; that, in pursuance of said contract, said plaintiff rendered services and worked for this defendant seventy-one & ¼ days; that, by the terms of said contract, said plaintiff was to

work & labor ten hours each and every day for the compensation aforesaid, and that upon said contract this defendant paid said plaintiff the said sum of three hundred & fifty-four dollars, & that this defendant is indebted to said plaintiff upon no other contract than the one last aforesaid.

And this defendant, for seperate answer to the second cause of action in said complaint mentioned, denies that on or about the 6th day of May, 1869, or at any other time, this defendant contracted with
33 one W. D. McKillican to work & labor for said defendant on said premises, at the rate of twelve dollars per day; denies that, in pursuance of any such contract, said McKillican worked and labored for this defendant on said premises for the space of one hundred & sixty-four days, or that he rendered any services whatever for this defendant in pursuance of any such contract, or that, by reason of any such services, this defendant became indebted to said McKillican in the sum of two thousand & fifty dollars, or any other sum; denies that said plaintiff is entitled to recover upon the contract sued on—the sum of twelve hundred & forty-two dollars and fifty cents—or any other sum or amount; denies that said McKillican ever filed a true & correct account, statement, and lien upon said property, as provided by law; denies that any lien was ever filed by said McKillican, as by statute in such cases provided, or that said plaintiff, by virtue of any lien, has obtained a lien upon said premises; denies, on information &
34 belief, that said McKillican ever did assign and transfer such pretended lien to said plaintiff, or that said plaintiff is the real party in interest in the said last cause of action in said complaint contained. Defendant, for further answer, says that, about the date mentioned in said complaint, he contracted with said McKillican to work & labor for him on said premises at the rate of ten dollars per day, in gold-dust, 10 hours' labor, by the terms of said contract, to constitute a day; that, in pursuance of said contract, said defendant rendered twenty-four days' service; that about the first of July, 1869, said defendant became disabled & could not perform the services required of him by said contract; that, at the date last aforesaid, this defendant made another different agreement with said McKillican, whereby this defendant undertook and agreed to pay said McKillican such sum as his services were reasonably worth; that, in pursuance of said agreement, said McKillican rendered services for this defendant for
35 the space of one hundred & twenty-nine days and a half; that five dollars for each and every day's labor under the contract last aforesaid, was & is a fair & reasonable compensation therefor; that this defendant paid said McKillican upon the services rendered upon the contracts aforesaid, the sum of seven hundred & ninety-six dollars; that no other contract or contracts were ever made by this defendant with said McKillican than as hereinbefore set forth. Wherefore he asks judgment for his costs & disbursements in this action.

WOOLFOLK & TOOLE,
Def't's Attorneys.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

G. Jules Germain makes oath & says, that he is the defendant in this action; that he has heard the foregoing answer read, and knows the contents thereof, and that he has reason to believe, and does believe, the matters therein stated to be true.

G. JULES GERMAIN.

36 MASSENA BULLARD, NOTARIAL SEAL, MONTANA TERRITORY. } Subscribed & sworn to before me this eighteenth day of March, A. D. 1870.

MASSENA BULLARD,
Notary Public.

Service of a copy of the foregoing answer duly made this day of , A. D. 1870.

And on the 23rd day of March, 1870, said plaintiff filed the following replication to said answer, which is in the words & figures following, to wit:

Replication to separate answer of G. Jules Germain.

In the district court of the 3rd judicial district, of the Territory of Montana, within and for the county of Lewis & Clarke.

JOHN BILSLAND, PL'FF,
vs.
G. JULES GERMAIN, DEF'T.

37 The above-named plaintiff for replication to so much of the defendant G. Jules Germain's answer herein filed as refers to a second contract made between the defendant and W. D. McKillican, on or about the 1st day of July, 1869, whereby said defendant undertook and agreed to pay so much as his services were reasonably worth, denies that any such contract was made between said parties.

This plaintiff for further replication avers that the services and labor of said McKillican during all of the time of his services mentioned in said defendant's answer, as well as in said plaintiff's complaint, were reasonably worth the sum of 15 dollars per day, for each and every day's work rendered by him as therein stated; wherefore plaintiff demands judgment & decree as in said complaint prayed for.

JOHNSTON, LOWRY & SHOBER,
Plaintiff's Att'ys.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

38 John Bilsland, being first duly sworn, says that he is the plaintiff in the foregoing entitled action, that he has heard read the foregoing replication, and knows the contents thereof, & that he has reason to believe & does believe the matters as stated therein to be true.

JOHN BILSLAND.

Subscribed & sworn to before me this the 23rd day of March, A. D. 1870.

A. J. EDWARDS,
Justice of the Peace.

And on the 5th day of April, A. D. 1870, the said defandant Germain, by his attorneys, filed in the case of Senior & McBurney vs. G. Jules Germain, a motion to consolidate the several actions on mechanics' liens now pending in this court, (including also this case,) and also his motion to cause other parties to litigate; which motions are in the words & figures following, to wit:

SENIOR & MCBURNEY, PLAINTIFFS,
vs.
G. JULES GERMAIN ET AL., DEFENDANTS.

39 In the district court 3rd judicial district in and for the county of Lewis and Clarke, and Territory of Montana.

Now comes the defendant, G. Jules Germain, by Woolfolk & Toole, his attorneys, and moved the court to consolidate the actions instituted by the defendants in the above-entitled cause, and that the matters in issue to be adjudged therein be embraced in a single decree.

This motion is based upon the papers and pleadings in this action & the respective pleadings of the said defendants in their separate actions, which are now on file in this court.

WOOLFOLK & TOOLE,
Def't Germain's Attorneys.

SENIOR & MCBURNEY, PLAINTIFFS,
vs.
G. JULES GERMAIN ET AL., DEFENDANTS.

Now comes the defendant, G. Jules Germain, and moves the court to cause all the defendants in this action to litigate their respective rights therein.

WOOLFOLK & TOOLE,
Def'ts' Att'ys.

40 And on the same day, during the progress of the trial of the said case of Senior & McBurney, *vs.* G. Jules Germain et al., an order was made and entered overruling said motions, in the words & figures following, to wit:

Order.

Ordered, that the said motion to consolidate be overruled. To which ruling the said defendant Germain, by his attorneys, at the time excepted.

And on the 6th day of April, A. D. 1870, said plaintiff Bilsland filed the following amendment to his complaint, by leave of the court, in the words and figures following, to wit:

To be inserted before the words "for second cause of action" page , line .

In 3rd judicial district court, Lewis and Clarke County, M. T.

JOHN BILSLAND, PL'FFS.
vs.
G. JULES GERMAIN ET AL.

41 For second and further cause of action, this complainant represents that the defendant G. Jules Germain, the owner and proprietor of the hereinafter referred to & described premises, on or about the 6th day of May, A. D. 1869, employed and hired one W. D. McKillican to do & perform labor and work for the said G. Jules Germain in and about the erection of a certain building in Helena City, Lewis and Clarke County, Montana Territory, known as the International Hotel, a more full description of which is contained in a copy of notice of lien

hereto attached. That said W. D. McKillican did then and there, at the special instance and request of said G. Jules Germain, do and perform in and about the erection of said building from the 9th day of May, A. D. 1869, until the 13th day of November, A. D. 1869, as foreman for said defendant, one hundred and sixty-four days' labor, and that said labor was and is reasonably worth the sum of $12 50 cents pre-
42 day, & that said defendant then and there promised to pay the said W. D. McKillican what the same was reasonably worth; but to pay the same or any part thereof, save and except as hereinafter credited, the said defendant has wholly failed & refused, although often requested so to do.

JOHNSTON & LOWRY,
Pl'ff's Attorneys.

MONTANA TERRITORY,
Lewis & Clarke County, ss:

John Bilsland, being duly sworn, says he is the plaintiff in the foregoing entitled action, and that he has heard read the foregoing amendment to the original complaint and knows the contents thereof, & that he has good reason to believe, & does believe, the matters and things therein stated to be true.

JOHN BILSLAND.

Subscribed & sworn to before me this 6th day of April, A. D. 1870.

CHAS. W. FOWLER, *Clerk.*

43 And on the 6th day of April, A. D. 1870, this cause coming on to be heard, a jury being waived, the same was tried by the court. Thereupon, after reading the pleadings, the plaintiff was introduced as a witness, who testified as follows, to wit:

I am the plaintiff in this action; I contracted with the defendant Germain to work on his hotel, called the International, and worked there on eighty-seven and three quarter days; said services were reasonably worth the sum of $12½ *dollars* per day, and amounts at such rate to $1,096.12. On my account said defendant paid $354, leaving a balance of $742.87.

(Which evidence was objected to by defendant as irrelevant, and said objection overruled & excepted to at the time.)

Said witness further testified that he purchased the account of W. D. McKillican, which was assigned to him in writing; that by the terms of said purchase and sale he was to have the lien of said McKil-
44 lican on said building, (to which evidence defendant objected, for the reason that the same was inadmissible, being testimony of the contents of a writing without laying the proper foundation therefor; which objection was overruled by the court and exceptions taken to said ruling at the time.) Here plaintiff introduced the instrument conveying said lien, which is in the words and figures following, to wit:

Agreement.

W. D. McKillican to John Bilsland.

Know all men by these presents that I, W. D. McKillican, of Helena City, Lewis & Clarke County, Montana Territory, for and in consideration of the sum of eight hundred (800) dollars, lawful money of the United States of America, to me in hand paid by John Bilsland, of the

same place, county, & Territory aforesaid, the receipt whereof is hereby acknowledged, have sold, assigned, transfer'ed, & set over, and by
45 these presents do sell, assign, transfer, and set over unto the said John Bilsland, his heirs and assigns, all that certain mechanic's lien or claim claimed by me, & filed in the county recorder's office, November 17th, 1869, at 2 o'clock p. m., for the amount of twelve hundred & forty-two $\frac{50}{100}$ dollars, the actual amount due me from G. Jules Germain for work and labor done on the International Hotel, as per statement of account attached to said mechanic's lien, and on the property, as described in said lien: To have and to hold unto the said John Bilsland, his heirs and assigns forever; and I do hereby constitute and appoint the said John Bilsland my true and lawful attorney, irrevocable, with power of substitution and revocation, for his use, and at his own proper cost & charges, to ask, demand, & to receive, and to take all lawful means for the recovery of the money due or to become due on the said debt or lien, & to compromise, compound, & adjust the same, and to acknowledge satisfaction, & discharge or release the same with or without payment in whole or in part, hereby ratifying & confirming all that
46 my said attorney or substitute shall lawfully do in the premises, & I hereby covenant that there is now due on the said debt the said sum of twelve hundred and forty-two dollars & fifty cents, current funds of the United States, & that I will not collect or receive the same or any part thereof, nor release or discharge the said debt or sureties, but will own and allow all lawful proceedings therein.

In witness whereof I have hereunto set my hand & seal this 20th day of November, A. D. 1869.

W. D. McKILLICAN.

Witness: D. B. JENKINS.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

Before me, W. B. Morrison, county clerk in & for said county, personally appeared W. D. McKillican, who is personally known to me to be the same person who executed the foregoing instrument, & who acknowledged to me that he executed the same of his own free will & accord, and for the uses and purposes therein mentioned.

Witness my hand and the seal of said county this 20th day of November, A. D. 1869.

47 W. B. MORRISON,
Co. Clerk.

Filed and recorded November 20th, A. D. 1869, at 4 o'clock p. m.
W. B. MORRISON,
Co. Recorder.
D. B. JENKINS, *Deputy.*

(To the introduction of which instrument aforesaid defendant objected, which objection was overruled by the court, & to which ruling defendant excepted.)

Plaintiff then introduced one W. D. McKillican, as a witness, who testified:

That he was employed by defendant, Germain, as his foreman, & worked for him 164 days, at $12½ per day; that there was paid thereon $807.50; that he sold his account and lien to plaintiff.

(To all of which evidence defendant objected, which objection was overruled, & exceptions taken to said ruling at the time.)

And on the 11th day of April, 1870, said court found the following facts, to wit:

48 *Findings and decision of court.*

In 3rd judicial district court, Lewis & Clarke County, Montana Territory.

JOHN BILSLAND, PL'FF,
vs.
G. JULES GERMAIN ET AL., DEFENDANTS.

The above-entitled action came on regularly for hearing and trial on the 6th day of April, A. D. 1870, J. H. Shober, A. J. Johnston & T. J. Lowry, appearing of counsel for plaintiff, and Messrs. Woolfolk & Toole for defendant G. Jules Germain, & Messrs. Chadwick & Chumasero for defendant A. J. Davis. A trial by jury having been expressly waived by the counsel for the respective parties, the said action was tried by the court, sitting without a jury. Whereupon witnesses were duly examined on behalf of plaintiff and defendants; and, thereupon, (argument of counsel having been waived,) the cause was submitted to the court for consideration and decision. And, after due deliberation therein, the court finds the following as the facts in the case, to wit:

That plaintiff, as a carpenter, performed 87¾ days' labor for
49 *plaintiff* on the premises described in plaintiff's complaint, during the months of July, August, September, October, and November, in the year A. D. 1869, and that he was to have $12.50 per day therefor, and that there was due him thereon, from defendant Germain, on the 17th day of November, A. D. 1869, therefor, $742.87½, and that he filed his lien therefor in the county clerk's office of Lewis & Clarke County, Montana Territory, on the 17th day of November, A. D. 1869, at 2 o'clock p. m., upon the premises upon which he labored. The court further finds, upon said plaintiff's second cause of action, that W. D. McKillican, at the special instance and request of defendant G. Jules Germain, performed for the said G. Jules Germain, on the premises described in plaintiff's complaint, as foreman for said defendant G. Jules Germain, 164 days' labor & services, from the 8th day of May, A. D. 1869, to the 13th day of November, A. D. 1869, and that his labor & services *was* reasonably worth $12.50 *dollars* per day, and that there was due the W. D. McKillican therefor from the said defendant G. Jules Germain, on the 27th day of November, A. D. 1869, $1,242.50 *dollars*.

That the said W. D. McKillican filed his lien therefor in the office
50 of the county clerk of Lewis & Clarke County, Montana Territory, on the 17th day of November, A. D. 1869, at 2 o'clock p. m.; that said W. D. McKillican, for a valuable consideration, duly assigned such account and lien to the plaintiff in this action on the 20th day of November, A. D. 1869, & that the plaintiff is now the owner thereof, and was at the time of the commencement of this action; that there is now due from said defendant G. Jules Germain, to said plaintiff two thousand and sixty-four $\frac{78}{100}$ dollars; that the building known as the International Hotel, and particularly described in plaintiff's complaint, & being the premises upon which plaintiff labored and claims lien, was commenced as early as the 21st day of May, A. D. 1869, and that defendant, during the time said labor was performed, was the owner of said premises described in plaintiff's complaint.

And as a conclusion of law from the above facts, the court finds that

the said plaintiff is entitled to have & recover of & from the said defendant, G. Jules Germain, the sum of two thousand and sixty-four $\frac{78}{100}$ dollars, and costs of suit, and that plaintiff have a lien there-
51 for on the premises described in plaintiff's complaint, and that judgment be entered accordingly.

Signed this 9th of April, 1870.

G. G. SYMES,
Judge 3rd Jud. District.

To which findings & filing thereof defendant excepted.

And on the 13th day of April, A. D. 1870, the plaintiff filed a motion for judgment & foreclosure of lien, which is in the words & figures following, to wit:

In 3rd judicial district court, Lewis & Clarke County, M. T.

JOHN BILSLAND, PL'FF,
vs.
G. JULES GERMAIN ET AL., DEF'TS.

Now comes the plaintiff in the above-entitled cause and moves for judgment and foreclosure of lien herein, upon the pleadings, proofs, and special findings herein.

52 JOHNSTON, LOWRY & SHOBER,
Plaintiff's Attorneys.

And on the 5th day of April, A. D. 1870, the court made and entered an order in the words & figures following, to wit:

JOHN BILSLAND
vs.
G. JULES GERMAIN ET AL.

The defendant Germain's objection to the findings & decree herein, upon the stipulation on file and admission that the lien filed in this case is a copy of the original lien therein, being taken up and considered, was overruled by the court, to which ruling the said defendant Germain, by his attorneys, then & there excepted.

And on the 13th day of April, A. D. 1870, said court rendered the following "decree," in the words & figures following, to wit:

53 In 3rd judicial district court, Lewis & Clark County, Montana Territory.

JOHN BILSLAND, PL'FF,
vs.
G. JULES GERMAIN, CHARLES DAHLER, Andrew J. Davis, Henry Wyttenbach, Barnes & Arnold, Senior & McBurney, Mason & Duke, John Barnett, W. W. Arnold, R. S. Hale, Parchen & Paynter, W'm P. Wilder, Jno. A. Murphy, Samuel Davenport, John Shively, Daniel B. Dressler, E. L. Curry, and Thomas Conrad, A. G. Clark, and John Curtin, def's.

This cause came on regularly for judgment & foreclosure of lien

upon plaintiff's motion, based upon proofs, pleadings, & special findings herein, (all defendants having been regularly summoned or having entered their voluntary appearance in said cause, and all of said defendants having been regularly defaulted except G. Jules Germain & A. J. Davis,) this 18th day of April, A. D. 1870, and it appearing to the court from the proofs, pleadings, & special findings that there is due from the defendant G. Jules Germain to the plaintiff herein the
54 sum of two thousand and sixty-four $\frac{78}{100}$ dollars; and that said sum was due for labor done and performed for said defendant, G. Jules Germain, upon the premises hereinafter described, and that the said plaintiff & W. D. McKillican, from whom he purchased account & lien, in accordance with the provisions of the statute of the Territory of Montana securing liens to mechanics & others, duly filed in the recorder's office of the said county of Lewis and Clarke, on the 17th day of November, A. D. 1869, a notice of intention to claim a lien upon the premises hereinafter described, to wit: Lots Nos. three (3) & four, (4,) in block No. twenty-one, (21,) fronting on Main street, and lot No. thirty-four, (34,) in block No. twenty-one, (21,) fronting on Bridge street, with the buildings thereon, all in Helena, Lewis & Clarke County, Montana Territory, and known as the International Hotel premises:

Now, on motion of Johnston, Lowry & Shober, counsel for plaintiffs, it is adjudged and decreed that the said plaintiff have judgment against the said G. Jules Germain for the sum of two thousand and sixty-
55 four $\frac{78}{100}$ dollars, with interest thereon from the date hereof at the rate of ten per cent. per annum, from date hereof, besides costs of action taxed at $\$56\frac{70}{100}$ *dollars;* that a special fieri facias may issue, and that if no sufficient property of the said defendant, G. Jules Germain, to satisfy the judgment, interest, and costs of suit, then that the residue thereof be levied and made out of the sale of the premises hereinafter described, upon which said liens were filed, and said judgment and costs is hereby declared a lien upon lots three (3) and four, (4,) in block number twenty-one, (21,) and lot thirty-four, (34,) in block twenty-one, (21,) as appears in accordance with the official plat of the town of Helena, Lewis and Clarke County, Montana Territory, on file in the office of the county clerk of said county, reserving the right of S. L. Holtzman in said lot No. 3.

That the sheriff of said county of Lewis and Clarke give public notice of the time and place of such sale, according to the course & practice of this court, and the law relative to the sale of real estate under execution, and that the plaintiff, or any of the parties to this action, may become the purchaser or purchasers at such sale, & that the sheriff, after
56 the time allowed by law for the redemption has expired, execute a deed to the purchaser or purchasers of the premises hereinbefore described.

That the sheriff, out of the proceeds of such sale, retain his fees & disbursements & commissions on said sale, and also the said sum of two thousand & sixty-four ($2,064.78) dollars, with accruing interest & all the costs of suit, paying the overplus, if any there be, into the said court, to await the order thereof.

That all the defendants (except William Senior, & George McBurney, & Barnes & Arnold, and James Mason, & L. D. Duke,) and all persons claiming or to claim from or under them, & all persons having liens or mortgages subsequent to said lien, by judgment or decree upon the premises hereinbefore described, and all their personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, be forever barred & foreclosed of and from all equity

of redemption & claim in and to the said hereinbefore described premises and every part thereof.

57 And it is further adjudged & decreed that the purchaser or purchasers of said premises at such sale be let into possession thereof, and that any of the parties to this action who may be in possession of said premises, or any part thereof, or any person who since the commencement of this action has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers on the production of the sheriff's deed for such premises, or any part thereof.

Given under my hand this 18th day of April, 1870.

G. G. SYMES.
Judge 3rd Judicial District, Montana Territory.

To which decree defendant Germain excepted.

And on the 20th day of April, 1870, said parties filed their stipulation in open court waiving notice of motion for a new trial, which said stipulation was in words & figures as follows, to wit:

WM SENIOR ET AL., PL'FFS, }
vs.
G. JULES GERMAIN ET AL., DEF'TS. }

58 In the district court, 3rd judicial district, in & for the county of Lewis & Clarke, and Territory of Montana.

Notice of motion for new trial & sufficiency thereof waived in all the cases wherein we are attorneys for plaintiffs against G. Jules Germain in actions upon mechanics liens upon the International Hotel, and in which findings and decrees and verdicts have been rendered during this term of the court.

SHOBER & LOWRY.
JOHNSTON.
J. J. WILLIAMS.
R. E. ARICK.
J. D. RITCHIE.

(The above motion in the case of Senior & McBurney vs. Germain relates to this case of Bilsland vs. Germain also.)

And on the 21st day of April, A. D. 1870, said plaintiff filed his stipulation in open court extending time for filing motion and statement for new trial, which said stipulation was in words & figures as follows, to wit:

59 SENIOR & MCBURNEY, PL'FFS, }
vs.
G. JULES GERMAIN ET AL., DEF'TS. }

It is hereby stipulated and agreed that the defendant, G. Jules Germain, have until the 25th day of May, 1870, to prepare and file his motion & statement for new trial, (in pursuance with notice heretofore waived,) in all mechanics' lien cases against the International Hotel, in which we are attorneys for plaintiffs.

JOHNSTON, LOWRY & SHOBER.
J. J. WILLIAMS.
CHUMASERO & CHADWICK.
R. E. ARICK.

(The above stipulation, in the case of Senior & McBurney vs. Germain, relates to this case of Bilsland vs. Germain also.)

JOHN BILSLAND, PLAINTIFF,
vs.
G. JULES GERMAIN ET AL., DEF'TS.

60 In the district court 3rd judicial district in and for the county of Lewis and Clarke, & Territory of Montana.

And now comes the defendant, G. Jules Germain, and in pursuance with the stipulations on file herein, & orders of the court thereupon made, & files this his motion, statement, and specifications of errors for a new trial, and as the grounds therefor shows unto the court here the following, to wit:

1st. Irregularities in the proceedings of the court and orders thereof, by which defendant was prevented from having a fair trial—

In this, to wit:

The court erred in overruling defendant's demurrer.

The court erred in overruling defendants' motions to consolidate.

The court erred in overruling defendants' objections to findings and decree, and the filing thereof.

2nd. Errors of law occur'ing at the time, and excepted to at the time by defendant'—

In this, to wit:

61 The court erred in overruling defendants' objections to the testimony of Bilsland and McKillican.

The court erred in overruling defendants' objections to the assignment of McKillican to plaintiff.

3rd. Insufficiency of the evidence to justify the findings and decree, & the same are against the law—

In this, to wit:

The evidence shows that no true & correct account and lien was filed.

That there is not due the plaintiff the amount found by the court.

That there was no lien filed as required by law.

The evinence is insufficient to support the allegations of the complaint.

The findings are insufficient to support the decree.

The decree is not in conformity with the allegations of the complaint or prayer thereof.

The decree and findings were not filed & rendered within the time allowed by law.

WOOLFOLK & TOOLE,
Def't Germain's Attorneys.

62 And on the 6th day of June, A. D. 1870, at a special term of the said court, an order was entered overruling the defendant Germain's motion for a new trial, & is in the words and figures following, to wit:

JOHN BILSLAND
vs.
G. JULES GERMAIN ET AL.

This cause came on to be heard upon defendant Germain's motion and

statement for a new trial & the amendments thereto. Pending the settlement of said statement it is agreed by the parties, Germain & Davis, in open court, under protest of plaintiff's attorneys, that the answer of defendant Davis shall be inserted therein. It is also further agreed by the parties in open court that the statement herein, this day settled by the court, may be used for passing on the motion for new trial, waiving the necessity of engrossing the same, until after the court shall hear and pass upon said motion for new trial; and all ob-
63 jection thereto waived, and upon a hearing of said motion had, it is—

Ordered that the same be, and is hereby, overruled and denied; to which ruling the defendant Germain, by his attorneys, then and there excepted.

And on the 7th day of June, A. D. 1870, at a special term of this court, an order was entered that defendant's motion to fix the amount of bond on appeal to stay the sale of property be assigned till to-morrow, which order is in the words & figures following, to wit:

JOHN BILSLAND
vs.
G. JULES GERMAIN ET AL.

Ordered that the defendant's motion, to fix the amount of bond on appeal to stay the sale of property mentioned in plaintiff's complaint, be assigned till to-morrow at 10 o'clock, for hearing.

And on the 8th day of June, A. D. 1870, the defendant Germain filed his appeal from the findings, filed on the 11th day of April,
64 which appeal is in the words and figures following, to wit:

JOHN BILSLAND, PLAINTIFF,
vs.
G. JULES GERMAIN ET AL, DEF'TS.

In the district court, 3d judicial district, in and for the county of Lewis & Clarke, & Territory of Montana.

You will take notice that the defendant Germain appeals from the findings, filed on the 11th day of April, & the order overruling motion for a new trial in the above-entitled cause, made on the 6th day of June, A. D. 1870, & the whole thereof, to the supreme court of this Territory. Dated this 7th day of June, 1870.

WOOLFOLK & TOOLE,
Att'ys for Def't and Appellant.

To the above-named plaintiff, & the clerk of said court, & Johnston, Lowry & Shober, pl'ff's att'ys.

Service of a copy waived this 7th day of June, 1870.

JOHNSTON, LOWRY & SHOBER,
Att'ys for Respondent.

65 And on the same day & year aforesaid, an order was entered, fixing the amount of bond on appeal, to stay the sale of property aforesaid, which order is in the words and figures following, to wit:

JOHN BILSLAND
vs.
G. JULES GERMAIN ET AL.

Defendant's motion to fix the amount of the undertaking to stay the

sale of the property, described in the complaint herein, coming on to be heard, it is ordered that a stay of said proceedings and sale be had upon the execution and filing of an undertaking to stay waste, in the sum of at least one-half of the amount of the judgment and costs in said cause, together with the usual three-hundred-dollar undertaking for costs.

And on the 9th day of June, A. D. 1870, the said defendant Germain filed his "undertaking on appeal," which is in the words and figures following, to wit:

66 JOHN BILSLAND, PLAINTIFF,
vs.
G. JULES GERMAIN ET AL, DEFENDANTS.

In the district court, 3rd judicial district, in and for the county of Lewis & Clarke, and Territory of Montana.

Whereas G. Jules Germain has appealed to the supreme court of this Territory from a judgment and decree, rendered in said cause, in favor of the plaintiff therein, on the 20th day of April, A. D. 1870, for the sum of two thousand and sixty-four $\frac{78}{100}$ dollars, with the costs therein, & also from an order of the court overruling his motion for a new trial, made and entered on the 6th day of June, A. D. 1870:

Now, therefore, we, the undersigned, in consideration of the premises and of such appeal, do hereby jointly and severally undertake and promise on the part of the appellant, that he will pay all costs and damages which may be awarded against him on said appeal, not exceeding the sum of three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound;

67 And whereas the said defendant is also desirous of staying the execution of the judgment and decree in so far as it relates to the sale of certain premises, known as the International Hotel, and more particularly described in said judgment and decree:

We do, therefore, in consideration thereof and of the premises, jointly and severally, undertake and promise & acknowledge ourselves bound in the further sum of eleven hundred dollars, (being the amount for that purpose fixed by the judge of this court,) that during the possession of said property by the said appellant he will not commit or suffer to be committed any waste thereon, not exceeding the said sum of eleven hundred dollars, so as aforesaid fixed by the judge of this court, by which the said judgment and decree was rendered.

Dated this 9th day of June, A. D. 1870.

CHA'S L. DAHLER. [SEAL.]
T. A. LARGEY. [SEAL.]

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

68 Cha's L. Dahler & P. A. Largey, the persons named in and who subscribed the foregoing undertaking as sureties thereto, being severally duly sworn, each for himself says that he is worth the amounts in said undertaking specified as the penalty thereof, over & above all his debts and liabilities, exclusive of property exempt from execution.

CHA'S L. DAHLER.
P. A. LARGEY.

{ MASSENA BULLARD. NOTARIAL SEAL. MONTANA TERRITORY. } Subscribed and sworn to before me this 9th day of June, A. D. 1870.
MASSENA BULLARD,
Notary Public.

Approved June 9th, 1870.

G. G. SYMES, *Judge.*

And on the 15th day of June, 1870, the defendant A. J. Davis filed his notice of appeal, which is in the words and figures following, to wit:

69 In district court, 3rd judicial district, county of Lewis & Clarke, Territory of Montana.

JOHN BILSLAND
vs.
G. JULES GERMAIN, A. J. DAVIS, ET AL.

You will please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of the said Territory from the decree therein made & entered in the said district court on the 20th day of April, A. D. 1870, in favor of the said plaintiff & against this defendant, & from the whole thereof, so far as relates to this defendant; and that this defendant assigns as error upon such appeal thus: The court erred in decreeing that the lien claimed by the said plaintiff upon the premises described in his complaint was paramount to that of this defendant.

Dated June 14th, 1870.

CHUMASERO & CHADWICK,
Att'ys for Def't Davis.

70 To Messrs. SHOBER & LOWRY & J. A. JOHNSTON,
Pl'ff's Att'ys.

And on the same day and year aforesaid the defendant A. J. Davis also filed his undertaking on appeal, which is in the words & figures following, to wit:

In district court, 3rd judicial district, county of Lewis and Clarke, Territory of Montana.

JOHN BILSLAND
vs.
G. JULES GERMAIN, A. J. DAVIS, ET AL.

Whereas the defendant in the above-entitled action, A. J. Davis, has appealed to the supreme court of the said Territory from a decree entered against him in said action in said district court in favor of the plaintiff in said action, on the 20th day of April, by which said decree the said court subjected the lien of the defendant A. J. Davis to the lien of the said plaintiff upon the premises in said complaint
71 in this action described, & from the whole and every part of the said decree so far as the same relates to the said defendant Davis.

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, John McCormick & D. Hagadorn, of the county and Territory above named, do hereby jointly & severally undertake &

promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars; to which amount we acknowledge ourselves jointly and severally bound.

Dated June 15th, 1870.

JOHN McCORMICK. [H. S.]
D. HAGADORN. [H. S.]

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

John McCormick & D. Hagadorn, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself says that he is worth the
72 amount specified in the said undertaking, over & above all his just debts & liabilities, in property not exempt from execution.

JOHN McCORMICK.
D. HAGADORN.

Subscribed & sworn before me this 15th day of June, A. D. 1870.

W. F. CHADWICK,
Notary Public.

Approved June 9th, 1870.

G. G. SYMES, *Judge.*

In district court, 3rd judicial district.

TERRITORY OF MONTANA,
County of Lewis & Clarke:

I, Cha's W. Fowler, clerk of the district court, do hereby certify that the foregoing seventy-two pages, numbered from one to seventy-two, inclusive, contain a true, full, & correct transcript on appeal of the papers, orders, and proceedings on file and of record in my office, in the case of John Bilsland vs. G. Jules Germain & others.

Witness my hand and the seal of said court this 1st day of July, A. D. 1870.

CHA'S W. FOWLER, *Clerk.*
By CHA'S G. REYNOLDS,
Deputy Clerk.

73 In the supreme court of Montana Territory, August term thereof, A. D. 1870.

JOHN BILSLAND, PL'FF & RESPONDENT,
vs.
G. JULES GERMAIN ET AL., DEF'TS & APPELLANT'.

And now, at this day, to wit, the 22d day of August, A. D. 1870, at a regular term of said supreme court, the above-entitled action came on regularly to be heard in said court, upon the appeal thereof from the judgment rendered therein in the 3rd judicial district court of said Territory; and the errors assigned on said appeal were fully argued by counsel for the respective parties, and submitted with briefs.

74 And afterwards, to wit, on the 15 day of November, A. D. 1870, at an adjourned sitting of said supreme court, the said cause coming on for final decision, the court ordered judgment therein to be entered, in words and figures following, to wit:

MASON & DUKE, JOHN BILSLAND, PL'FFS & respondents,
vs.
G. J. GERMAIN ET AL., DEF'TS, & APpellants.

Now, at this day, to wit, the 15th day of November, A. D. 1870, at an adjourned sitting of said supreme court, this cause coming on for final judgment on the appeal thereof: and the errors assigned on the said appeal having being fully argued by counsel and submitted with briefs, and the court being fully advised as to the law in the case:

75 In consideration whereof it is ordered, adjudged, and decreed by the court that this cause be remanded to the court below, and the judgments entered in favor of the plaintiffs, and the several defendants herein, for the respective amounts found due to them are affirmed, and the costs of filing the several complaints as answers in this cause, and serving copies of the same, and such costs as were necessarily incurred by them in defense and assertion of their several rights in this proceeding, shall be ascertained and taxed by the court; and it is further ordered and adjudged that the appellants Germain and Davis respectively recover from the several defendants herein the costs and charges incurred by them in answering and defending the several seperate proceedings herein specified to be taxed by the court.

76 It is further ordered that special fieri facias executions issue in favor of said several parties for the said amounts for which said judgments were rendered and their costs by the court, if such executions have not heretofore issued, and that if no sufficient property of defendant Germain has been or can be found to satisfy the said several judgments and costs taxed, that then the residue of such judgments or any of them be levied out of said property described in the complaint, and that said property, or so much thereof as may be necessary, be sold in accordance with law to satisfy the same, and that out of the proceeds of such sale there be paid the costs of suit and of sale, and thereafter the said judgments be paid and satisfied to the extent of such proceeds in the order of filing the said several accounts and notices of lien
77 in the recorder's office as found by the court, and that said several liens so found by the court be decreed to be prior and paramount to the mortgage executed by appellant Germain to appellant Davis, mentioned and set out in the answer of said Davis, and that the surplus, if any, be brought into court to await its further order.

Filed & entered Nov'r 15, 1870.

I. R. ALDEN, *Clerk.*

And on the same day, November 15, 1870, the justices of said supreme court filed in said cause their opinion in writing, of which the following is a copy, to wit:

78 In the supreme court of the Territory of Montana, of the August term thereof, A. D. 1870.

JAMES MASON & L. D. DUKE, PARTNERS under the name and style of Mason & Duke, respondents,
vs.
G. JULES GERMAIN ET AL., APPELLANTS.
Appeal from Lewis & Clark County.

On the twenty-fifth day of November, A. D. 1869, the respondents

filed their complaint in the district court of the 3d judicial district in and for Lewis & Clark County, to *to* enforce a lien for work done and materials furnished by plaintiffs, upon and for a certain building erected upon certain lots situated in the town of Helena, described in the complaint, under a contract with the owner, G. Jules Germain, one of the defendants. The other defendants are made parties to the proceeding, upon the ground of interest in the property sought to
79 be charged, claimed by them, respectively, which is alleged to have accrued subsequent to plaintiffs' lien. It does not appear that summons issued; but defendants Davis & Germain answered separately, and the court finds in the judgment rendered that all the defendants, except Germain, Davis, Dahler, and Wyttenbach appeared to the action, waived service of summons, and that default was regularly entered against them, respectively. After appearance of a defendant in an action, default cannot be entered against him, but judgment can be rendered by "nil dicit," or for want of answer, and such is substantially the course pursued in this case.

On the same day, November 25, 1869, John Bilsland, one of the defendants in this suit, filed his complaint in the same court, to enforce a mechanics' lien upon the same buildings and lots, making the
80 plaintiffs in this suit, together with his codefendants herein, parties defendant in that proceeding; and, on the same day, defendants Clark, Conrad & Curtin commenced a proceeding, in the same court, for the purpose of enforcing a lien for materials furnished for the same building, and in which the same parties are impleaded.

On November 27th, 1869, W'm P. Wilder, John Shively, D. B. Dressler, Samuel Davenport, and E. L. Curry, respectively; and on November 29, 1869, Barnes & Arnold, as partners; and on December 14, 1869, R. S. Hale; and on February 10, 1870, Benjamin Daily; and on February 12, 1870, D. B. McKillican, each being a defendant in this suit, separately commenced a suit to enforce their several liens against the same property, and impleading the parties to this suit in each proceeding.

Afterwards, such proceedings were had in each one of said suits,
81 that judgment was rendered in favor of the respective plaintiffs, and, in each case, a separate decree of sale of the property was entered, to satisfy the lien found.

In each one of these several proceedings defendant Germain entered a motion for an order to consolidate these actions, and also to require the plaintiffs therein to litigate their respective claims in one action, and that all matters adjudged between the parties should be embraced in one decree. These motions were each overruled by the court.

Upon appeal from a judgment this court will review intermediate orders affecting the judgment, and we will first consider this order overruling these motions, as affecting the question of costs and the rights of the parties appealing.

A consolidation of suits is only ordered where the parties, plaintiff and defendant, are the same in each, and the subject-matter such
82 as may be joined, so that this was not properly a question of consolidation of the suits. The practice and proceeding, however, under the act in question, are the same as in other civil actions. The remedies under it are twofold. An ordinary judgment, and, in the event no sufficient property be found, enforcement of the lien established, by sale of the property charged, as between themselves, the several lien-holders take priority in the order of filing their accounts and notices of lien with the county recorder.

Where separate suits are commenced, the plaintiffs in which are not

united in interest, and several judgments are sought, joinder of their actions would be improper, but in so far as the statute provides for enforcement of the liens created by it against the same property in favor of several lien-holders, the action under it is in the nature of an
83 equitable proceeding, and should be governed by the rules pertaining to such.

It is not necessary to determine at this time whether, in a suit instituted under the act, a party may recover a judgment at law for the amount found due to him. Notwithstanding his failure to establish a lien therefor, so far as the liens are concerned, the several lien-holders are not to be regarded as incumbrances of the same property sought to be charged, and their respective rights adjudicated as such.

The "Act securing liens to mechanics and others," provides that parties to the contract shall, and all others interested may, be made parties, but at the same time the practice in other civil cases is made applicable under it, and, under our practice, a defendant is required to answer the complaint specifically, and also to set up as a counter-
84 claim any matter which entitles him to relief, either against the plaintiff or any codefendant.

It is not permitted him, after the court has acquired jurisdiction over him in a cause, either by service of summons, or by voluntary appearance, to suffer a default, or fail to answer, and then institute a seperate action in which the same subject-matter and parties are involved. While different lien-holders need not necessarily be made defendants, unless it is sought to bind them by the decree, yet, if made defendants, as in this case, their rights must be adjudicated in one proceeding, so far as their several liens are concerned.

None of the parties in these causes have appealed to this court, except Germain, who appeals seperately in each, and Davis, who appeals in the proceeding in which Bilsland is plaintiff below.

85 There is manifest injury sustained by these appellants in permitting each one of the defendants in this cause to maintain a seperate action for the enforcement of his lien, and in each entering a decree of sale of the property, when under our "Practice Act," as well as under the established chancery practice, the rights of all should have been determined in one action, and the several claims established as liens, ordered satisfied out of the proceeds of one and the same sale of the property charged.

By the course pursued, the appellants are not only harassed by the multiplicity of suits, and subjected to accumulation of costs, but suffer from possible sacrifice of the property in consequence of the twelve several sales ordered. It may be remarked, also, that the several
86 lien-holders, although not appealing, sustain injury in consequence of the proceeding.

It is claimed that each has the right to redeem from the preceding sale or sales ordered, but this is not adequate protection of his rights, and may be substantially a denial of them. Mechanics & materialmen are not always men of capital, and to require junior lien-holders to pay off all prior liens in order to protect their own liens defeats the purpose of the act.

We hold, therefore, that the court erred in overruling the motion of defendant Germain to require the defendants to submit their respective rights for adjudication in one action, but we feel authorized, as an appellate court, to correct this error, and to treat the several complaints filed as counter-claims set up by them respectively; and since the
87 motion of Germain was filed in each case, and since this action,

in which Mason and Duke are plaintiffs, is the first cause on the calendar of this court, commenced on November 25, 1869, in the court below, we will regard said complaints as counter-claims in this cause, and will review the transcripts in the order in which they stand on this calendar, and having reference also to the date of filing below.

Before considering the questions raised in each case seperately, we will first pass upon questions applicable to all equally. In each case defendant Germain appeals from the judgment rendered, and from the order overruling his motion for a new trial. This he may do, but upon appeal from a judgment, not accompanied by a statement, this court will
88 only review errors of law appearing on the record itself, properly specified.

Upon a motion for a new trial there must be, in every instance, either a statement, signed by the attorneys of the parties, or settled and certified by the judge, or affidavits, showing the errors alleged. No question of fact will be considered in this court unless all the evidence relating thereto be embodied in or definitely referred to in the statement, nor will any error of law be regarded unless material and properly specified in the statement. Mere recitation in the transcript of what purports to be facts, or stipulations of attorneys, not embodied in or distinctly identified by the statement, will not be considered. In this case, in every instance, that which purports to be a "statement" is more properly a notice of a motion for a new trial than a statement, and in no instance is the evidence embodied or definitely referred to;
89 and hence it will be presumed in this court that the evidence was sufficient to support the findings of facts in the court below, and we will be confined to examination of errors in law appearing upon the record and properly specified.

The several notices of appeal specify that the respective appeals are from the "findings" of the court below, as well as from the judgments and orders overruling the motions for a new trial, and we will remark that no appeal lies from the "findings" of a court which correspond to the special verdict of a jury. The "statement" on the motion for a new trial, in each instance, specifies as grounds for the motion, in addition to error of law and insufficiency of the evidence, "irregularity in the proceedings of the court."

The "irregularity" mentioned in the statute refers to irregu-
90 larity in the proceedings not appearing on the face of the record, and must be shown by affidavit. The irregularities specified in the several statements are not of this character, but appear on the record, and we will so consider them.

In the case under consideration, wherein Mason & Duke are plaintiffs, the first error of law specified is the overruling of the demurrer of appellant Germain to the complaint. The demurrer we hold to have been properly overruled, as the facts stated constitute a cause of action. The order overruling the motion to require defendants to litigate their respective rights in this proceeding we have already considered, and the error assigned in rendering the decree, of course, depends upon the determination of the other questions presented. The second ground of the motion for a new trial is "insufficiency of the evidence to
91 support the findings and decree," but, as we have already stated, all the evidence not being preserved and embodied in the statement settled, we must presume in favor of the judgment below. There appears in the transcript a stipulation, signed by the attorneys of the respective parties, as to the amount due plaintiffs, and also an entry reciting the examination of witness upon certain matters, and the

allowance of $75.00 as damages by the court for a defective range and flue, but both of these, neither forming a part of the record, nor being embodied in a statement, will be disregarded.

The fact that the complaint and notice of lien claimed as due plaintiffs a larger amount than that found by the court, will not destroy their lien for the amount actually due, unless there be a fraudulent intent in filing the same, which must be proven, and will not be presumed.

92 Upon the other points specified, the evidence necessary to sustain them not being preserved, the presumptions are in favor of the judgment below. The court finds that the building in question was commenced May 21st, 1869; that thereafter, plaintiffs Mason & Duke, under a contract with the owner, defendant Germain, furnished material for, and performed labor on the same, and within sixty days after completion of such contract, and on September 29th, 1869, at 2½ o'clock p. m. of said day, duly filed their notice of lien and account in the county clerk's office of said Lewis and Clark County, and that there was due plaintiffs therefor $5,215.46, for the payment of which they were decreed a lien on the property described.

In the case of John Bilsland, defendant Germain appeals from the order overruling his motion for a new trial; and defendant Davis appeals from the decree therein rendered as against him. Under

93 our view the appeal of Davis in this case is as effectual as if he had appealed in all, and his rights and priority as mortgagee, can be determined fully; and we will consider these questions hereafter.

In the order overruling Germain's motion for a new trial, a statement is referred to as having been settled by the court, although none is certified by the court. Some evidence is set out in the transcript, but it is not certified, nor does it purport to be all the evidence, and the presumptions favor the judgment below. The error assigned in overruling the demurrer to the complaint, and in admitting proof of and sustaining the assignment of McKillican's lien to plaintiff, we do not think well grounded. While a lien is inchoate, and before the completion of the contract, an assignment of the claim for labor or materials would not carry a lien; but we can see no reason in law, public

94 policy, or principle, why a lien when perfected should not follow the assignment of the claim on which it is founded.

The other errors assigned we have considered.

The court finds the plaintiff entitled to a lien for $2,064 $\frac{75}{100}$, and that he duly filed his notice of lien for $742 $\frac{75}{100}$ on November 17th, 1869, at 2 o'clock p. m.; and that McKillican at the same time duly filed notice of his lien for $1,242 $\frac{50}{100}$.

It is evident the court allowed interest upon these claims, and to sustain this ruling it must be presumed there was evidence before it that the amounts were vexatiously withheld.

In the following cases no new questions are raised:

The court finds Clark, Conrad, and Curtin entitled to a lien for

95 $627.00, and that notice of lien was filed November 22d, 1869; that D. B. Dressler is entitled to a lien for $566 $\frac{50}{100}$, and that notice of lien was filed November 17th, 1869; that William P. Wilder is entitled to a lien for $1,505 $\frac{75}{100}$, and that notice of lien was filed November, 17, 1869, by himself, for $771 $\frac{75}{100}$; and on the same day, at 10 o'clock a. m., by John A. Murphy for $734.00; and that Murphy duly assigned his claim and lien therefor to Wilder; that John Shively is entitled to a lien for $400.00, and filed his notice of lien on November 17, 1869, at 11½ o'clock a. m.; that Barnes and Arnold are entitled to two liens, one for

$5,277\frac{68}{100}$, notice of which was filed November 17, 1869, at 11½ a. m., and the other for $1,037\frac{87}{100}$, notice of which was filed November 11th, 1869. In this case the court made John Kinna a party defendant, on his own motion. Kinna filed his answer, setting up a lien on the property for work done upon and materials furnished for the same.

96 This was proper practice. The objections of appellant, though not properly presented, we will review.

The first is that appellant was not served with process, and did not appear in such proceeding. The order made by the court, making Kinna a defendant in the cause, charged all the parties with notice, and no process was required. Each party, however, was entitled to service of a copy of his answer and counter-claim. If such copy was not served, and appellant desired to save the error, it should have been presented by affidavit as an irregularity, and in the absence of such affidavit it will be presumed from the finding of the court that a copy was duly served, which gave the court jurisdiction of the subject-matter of the counter-claim. The court finds defendant John Kinna entitled to a lien for $1,139.00, and that notice of lien was filed November 30th, 1869.

97 The court also finds Samuel Davenport is entitled to a lien for $480.00, and that he filed notice of lien November 17, 1869; that E. L. Curry is entitled to a lien for $888.00, and that notice was filed November 17th, 1869, at 2 o'clock p. m.; that R. S. Hale is entitled to a lien for $470\frac{35}{100}$, and filed notice November 15th, 1869; that Benjamin Daily filed notice of lien for $571\frac{63}{100}$, on January 12th, 1870, and is entitled to a lien for $590.00, which must include interest allowed for vexatious withholding; that D. B. McKillican is entitled to a lien for $526.00, and filed notice of lien December 8th, 1869, at 5 o'clock p. m.

Upon the appeal of defendant Davis, the only question presented relates to the priority of the mortgage of the property in question, executed to him by defendant Germain, over the several liens established.

98 Upon this point a majority of this court are of opinion that the statute expressly gives preference to liens of mechanics and material-men.

Moreover, any incumbrances made subsequent to the commencement of the building, and that the court having found the fact that the building in question was commenced before the execution of said mortgage, all the liens found were properly preferred to it.

This cause is therefore remanded to the court below, and the judgments entered in favor of the plaintiffs, and the several defendants herein, for the respective amounts found due to them are affirmed, and the costs of filing the several complaints as answers in this cause, and serving copies of the same, and such costs as were necessarily incurred by them in defense and assertion of their several rights in this proceeding, shall be ascertained and taxed by the court. And it is

99 ordered and adjudged that the appellants, Germain and Davis, respectively recover from the several defendants herein the costs and charges incurred by them in answering and defending the several seperate proceedings herein specified, to be taxed by the court.

It is further ordered, that special fieri facias executions issue in favor of said several parties for the said amounts for which said judgments were rendered, and their costs by the court, if such executions have not heretofore issued, and that if no sufficient property of defendant Germain has been or can be found to satisfy the said several judgments and costs taxed, that then the residue of such judgments, or any of them, be levied out of said property described in the complaint, and that said property, or so much thereof as may be necessary, be

100 sold in accordance with law to satisfy the same, and that out of the proceeds of such sale there be paid the costs of suit and of sale, and thereafter the said judgments be paid and satisfied to the extent of such proceeds in the order of filing the said several accounts and notices of lien, in the recorder's office, as found by the court, and that said several liens so found by the court be decreed to be prior and paramount to the mortgage executed by appellant, Germain, to appellant, Davis, mentioned and set out in the answer of said Davis; and that the surplus, if any, be brought into court to await its further order.

H. L. WARREN, *C. J.*

Dissent.

I respectfully dissent from so much of the foregoing opinion as relates to the question of priority of Davis' mortgage over the
101 several liens established. The contracts under which the different claimants performed labor or furnished material were entirely seperate and distinct one from the other; and, in my opinion, the priority of each must be determined by the date at which he himself commenced to fulfill his contract, and not by the commencement of some other work under another contract, by another person, on the same building. The statute contemplates the completion of the building, or erection under one contract; and, in that event, gives preference over any incumbrance made subsequent to the commencement of the building or erection, but does not relate to several contracts, each of which is made with reference to incumbrances as they exist at the time of commencing to fulfill them respectively.

H. L. WARREN, *C. J.*

102 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Montana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, between John Bilsland and G. Jules Germain, Charles Dahler, Andrew J. Davis, Henry Wyttenbach, John P. Barnes, & W. W. Arnold, W'm Senior, & Geo. McBirney, James Mason, & L. B. Duke, Jno. Barnett, R. S. Hall, H. Parchen, W. S. Paynter, W'm P. Wilder, Jno. Murphy, Sam'l Davenport, John Shiveley, Daniel B. Dressler, E. L. Curry, A. G. Clark, Tho's Conrad, & John Curtin, a manifest error has happened, to the great damage of the said Andrew J. Davis, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December, A. D. 1871, in the said Supreme Court to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, and J. R. Alden, clerk of the Su-

preme Court in and for the district of the Territory of Montana, this 15th day of September, A. D. 1871.

[SEAL.] J. R. ALDEN, *Clerk.*

Allowed by—

D. S. WADE,
Chief Justice Montana Territory.

(Indorsed:) John Bilsland vs. G. Jules Germain, A. J. Davis et al. Writ of error. Filed Sept. 15, 1871. J. R. Alden, clerk.

103 In supreme court, Montana Territory.

JOHN BILSLAND
vs.
G. JULES GERMAIN, CHARLES DAHLER, Andrew J. Davis, W. W. Arnold, Henry Wyttenbach, John P. Barnes, W. Senior, Geo. McBirney, J. Mason & L. B. Duke, D. P. Lake, R. S. Hall, Henry Parchen, W. S. Paynter, W. P. Wilder, Jno. Murphy, Sam'l Davenport, John Shively, Dan'l B. Dressler, E. L. Curry, A. G. Clark, Thomas Conrad, John Curtin, & J. Burnett.

You will take notice that we shall, on the 15th day of September, 1871, at 10 o'clock in the forenoon of that day, at the office of the clerk of the supreme court of the Territory of Montana, in Virginia City, M. T., apply for the issuance of a writ of error in the above-entitled cause, in favor of Andrew J. Davis, one of the said defendants, at which time and place you are hereby notified to appear and join with said Davis in the obtaining of said writ of error, and that in the event of your failure or refusal so to do, the same will be obtained by and issued in favor of said Davis alone.

CHUMASERO & CHADWICK,
Att'ys for Davis.

To said defendants or their attorneys.

104 TERRITORY OF MONTANA,
Lewis & Clark County, ss:

Rufus E. Arick, being first duly sworn, doth depose and say that, on the 28th day of August, 1871, he personally served a copy of the foregoing notice on Mess. Johnson, Shober, and Lowry, attorneys for Senior & McBirney, Mason & Duke, E. L. Curry, W. P. Wilder, Dressler, Davenport, Shively, Clark, Conrad, & Curtin, by delivering to Mr. Johnson a copy thereof; and on the same day on Mess. Woolfolk & Toole, by delivering a copy thereof to Mr. Woolfolk, att'ys for Germain, Dahler, & Wyttenbach, and on the same day on W. F. Sanders, att'y for Parchen & Paynter, by delivering to him a copy thereof; and that he, this affiant, received a copy thereof himself as the att'y of R. S. Hale.

R. E. ARICK.

Subscribed & sworn to before me this 8 day of September, 1871.

WM CHUMASERO,
Notary Public Lewis & Clark County, M. T.

We, the undersigned, have accepted service of copy of above, as attorney for Barnes & Arnold, and refuse to join in the writs of error.

CHUMASERO & CHADWICK,
Att'ys for Barnes & Arnold.

(Indorsed:) John Bilsland vs. A. J. Davis, G. Jules Germain et al Notice & aff'd't of service. Filed Sept'r 11, 1871. J. R. Alden, clerk

105 In the supreme court of Montana Territory.

JOHN BILSLAND
vs.
G. JULES GERMAIN, CHARLES DAHLER, Andrew J. Davis, W. W. Arnold, Henry Wyttenbach, John P. Barnes, W. Senior, George McBirney, J. Mason, L. B. Duke, D. P. Lake, R. S. Hale, Henry Parchen, W. S. Paynter, W. P. Wilder, John Murphy, Samuel Davenport, John Shively, Dan'l B. Dressler, E. L. Curry, A. G. Clarke, Thomas Conrad, John Curtin, and J. Burnett.

I, J. R. Alden, clerk of said supreme court, do hereby certify that the defendants in the above-entitled cause mentioned and cited in the foregoing notice to appear at the said clerk's office on the 15th day of September, A. D. 1871, and join in the writ of error, failed & refused to appear, and that the foregoing writ of error was issued in pursuance of their default, in the name of Andrew J. Davis alone, one of the said defendants.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court, at Virginia City, in said Territory, this 7th day of October, A. D. 1871.

[SEAL.] J. R. ALDEN, *Clerk.*

106 UNITED STATES OF AMERICA, *ss:*

To JOHN BILSLAND, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December, A. D. 1871, pursuant to a writ of error filed in the clerk's office of the clerk of the Supreme Court in and for the district of Montana Territory, wherein the said Andrew J. Davis is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable D. L. Wade, chief justice of the supreme court of Montana Territory this 22d day of September, A. D. 1871.

[SEAL.] D. L. WADE,
Chief Justice aforesaid.

Service of copy acknowledged September 22d, 1871, (as second citation.)

SHOBER, LOWRY & JOHNSON,
Att'y for Jno. Bilsland, Def't in Error.

TERRITORY OF MONTANA,
Lewis & Clark County, ss:

R. E. Arick, being duly sworn, says that, on the 22d day of September, 1871, he served the within citation on Mess. Shober, Lowry & Johnson, atty's of John Bilsland, by showing the same to them, and delivering a copy to them personally.

R. E. ARICK.

Subscribed and sworn before me this 22d day of Sept. 1871.

[SEAL.] W. F. CHADWICK,
Notary Public.

(Indorsed:) John Bilsland, def't in error, vs. G. Jules Germain, et al., pl'ffs in error. Citation. Filed Oct'r 7, 1871. J. R. Alden, clerk, sup. court, M. T.

107 UNITED STATES OF AMERICA,
Territory & District of Montana, ss:

In supreme court of the Territory of Montana.

JOHN BILSLAND
vs.
G. JULES GERMAIN, CHARLES DAHLER, Andrew J. Davis, Henry Wyttenbach, Jno. P. Barnes, W. W. Arnold, William Senior, George McBirney, D. P. Lake, R. S. Hale, Henry Parchen, W. S. Paynter, W'm P. Wilder, Jno. Murphy, Sam'l Davenport, John Shively, Daniel B. Dressler, E. L. Curry, A. G. Clark, Thomas Conrad, Jno. Curtin, J. Burnett.

Andrew J. Davis, one of the defendants in this action, and who has appealed from the judgment and decree therein, rendered by the supreme court of the Territory of Montana, to the Supreme Court of the United States, being duly sworn, deposes and says: That the amount in controversy in this cause, between himself and his co-defendant, G. Jules Germain, is the sum of six thousand seven hundred and ninety-two dollars, with interest thereon from the 9th day of June, 1869. That the amount in controversy between the plaintiff and said Germain exceeds the sum of two thousand dollars, and that the total amount in controversy in said action exceeds the sum of twenty thousand dollars; and further saith not.

A. J. DAVIS.

Subscribed and sworn to before me this 26th day of September, 1871.
[SEAL.] W. F. CHADWICK, *Notary Public.*

(Indorsed:) John Bilsland vs. G. Jules Germain. Aff'd't of amount in controversy. Filed Oct'r 7, 1871. J. R. Alden, clerk sup. court M. T.

108 And on the same day, November 21, A. D. 1870, the said defendant & appellant, A. J. Davis, filed with the clerk of said supreme court of Montana Territory his undertaking on the appeal of said cause to the Supreme Court of the United States; of which un-
109 dertaking, in words and figures, the following is a copy.

In supreme court, Territory of Montana.

JOHN BILSLAND
vs.
A. J. DAVIS ET AL.

Know all men by these presents that we, Andrew J. Davis, Patrick A. Largey, & John McCormick, residents and freeholders of the above-named Territory, are held and firmly bound unto John Bilsland, in the sum of one thousand dollars, (being the amount fixed by said court,) to be paid to the said John Bilsland, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, & each of us, our heirs and executors, & administrators firmly by these
110 presents, sealed with our seals & dated this 5th day of September, A. D. 1870.

Whereas the above-named Andrew J. Davis has prosecuted a writ of error to the supreme Court of the United States to reverse the judgment rendered in the above-entitled action, against the said Andrew J. Davis in the supreme court of the said Territory:

Now, therefore, the conditions of this obligation is such that if the above-named Andrew J. Davis shall prosecute the said writ of error to effect, and answer all costs if he fail to make good their plea, then this obligation shall be void; otherwise the same shall be & remain in full force & virtue.

A. J. DAVIS.
P. A. LARGEY.
JOHN McCORMICK.

TERRITORY OF MONTANA,
County of Madison, ss:

111 P. A. Largey & Jno. McCormick, being first duly severally sworn, each for himself deposes & says that he is a resident and freeholder in the said Territory, & that he is worth the sum of one thousand dollars over & above his just debts and liabilities, in property not exempt from execution.

P. A. LARGEY.
JNO. McCORMICK.

Subscribed & sworn before me this 21st day of Nov., 1870.
J. R. ALDEN,
Clerk Sup. Court M. T.

UNITED STATES OF AMERICA,
District of Montana Territory, ss:

I, the undersigned chief justice of the supreme court of the Territory of Montana, do hereby approve of the foregoing undertaking on bond on appeal to the Supreme Court of the United States.

112 Witness the honorable chief justice of the supreme court of the said Territory this 21st day of November, A. D. 1870.

H. S. WARREN,
Chief Justice.

(Endorsed:) Filed Nov. 21, 1870. J. R. Alden, clerk.

113 Supreme court of Montana Territory.

JOHN BILSLAND
vs.
G. JULES GERMAIN, ANDREW J. DAVIS, ET AL.

I, J. R. Alden, clerk of the supreme court of Montana Territory, do hereby certify the foregoing one hundred and twelve pages, numbered from one to one hundred and twelve, to contain a full, true, & correct statement of the proceedings had in the above-entitled cause as the same appear on file and of record in my office.

Witness my hand, and the seal of said supreme court, at Virginia City, in said Territory, on this 7th day of October, A. D. 1871.

[SEAL.] J. R. ALDEN, *Clerk.*

(Indorsement on cover:) No. 350. Andrew J. Davis, plaintiff in error, vs. John Bilsland. Montana Terr'y sup. court. Filed 23d February, 1872.

Supreme Court of the United States.

OCTOBER TERM, 1873.

No. 141.

ANDREW J. DAVIS, PLAINTIFF IN ERROR,

vs.

JOHN BILSLAND.

In Error to the Supreme Court of the Territory of Montana.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This was an action brought in the District Court for the Third Judicial District of the Territory of Montana, on the 25th day of November, 1869, to recover on an account for certain labor performed by the plaintiff, for one G. Jules Germain, one of the defendants below, amounting to the sum of $742.87; and, also, to recover on an account for work done by one W. D. McKillican, for the said Germain, amounting to about $1,242.50, which latter account had been assigned, in writing, by the said McKillican, to the said plaintiff.

The amounts so sued for, were for work done by both the plaintiff and McKillican, upon a building called the International Hotel, in Helena City, Montana Territory. And in the same suit, the plaintiff not only claimed judgment for the said sums, but sought to enforce a mechanic's lein upon the said property, for labor performed as afore-

said, and to foreclose all equities of redemption in the premises.—*Record*, 1–6.

These liens were claimed, in pursuance of the provisions of an act of the Legislative Assembly of the Territory of Montana, entitled "An Act Securing Liens to Mechanics and others," approved December 30, 1864.

On the 6th day of May, 1869, the said W. D. McKillican was employed by the defendant, Germain, who was then the owner of the ground upon which the hotel was to be erected, to do the work upon the building, on the account for which work, this suit was brought; and on the 8th of May, 1869, he commenced his labor thereon. Afterwards, Germain executed and delivered to the defendant, A. J. Davis, a mortgage upon the hotel premises, with other property, to secure the payment of $6,792.00; and this mortgage bore date, and was duly recorded, June 9th, 1869. The plaintiff below was, also, employed by Germain to labor upon the building; and on the 16th day of July, 1869, he commenced work upon the same.—*Record*, 2–5, *and* 8, 9.

On the 17th day of November, 1869, both McKillican and Bilsland filed their respective notices and claims for liens for the labor performed upon the said building; and McKillican, on the 30th of November, 1869, by an instrument in writing, assigned his claim for lein to the plaintiff, Bilsland.—*Record*, 8, 9, 14.

The prayer of the plaintiff's complaint is in the words following:

"Wherefore, the plaintiff prays judgment against said defendant, G. Jules Germain, in the amount of the several sums so due him as aforesaid, amounting, in all, to the sum of $1,967.51, with interest thereon from and after the date of filing the said notices of lien, to wit, from the 17th day of November, 1869, as well as for his costs in this suit; and that it be adjudged and decreed by this Court, that the defendants, G. Jules Germain, Charles Dahler, Andrew J. Davis, Henry Wittenbach and the firm of Clark, Conrad & Curtin, and all persons whomsoever claiming right, title, demand or lien by, through or under them or either of them, subsequent to the commencement of this

action, be forever barred and foreclosed of all right, title, claim, lien and equity of redemption in or to said encumbered premises, or any part thereof; and that said premises be decreed to be sold according to law, and the moneys arising from such sale be brought into Court; that the plaintiff may be paid the amount due as aforesaid, with interest up to the time of said payment, as well as the costs and expenses of this action, so far as the moneys properly applicable thereto will pay the same, and that the said G. Jules Germain be adjudged to pay the deficiency, if any there be, after paying all of said moneys so applicable thereto; and that the plaintiff may have such other and further relief as to this Court may seem just and equitable."—*Record*, 3.

The cause was tried by the Court, and on the 18th day of April, 1869, a judgment was rendered in favor of the plaintiff, for the amounts claimed to be due on the said accounts for labor, with interest and costs; and, at the same time, a decree was passed that the said judgment should constitute a lien upon the premises, and, in effect, that said several liens should be prior and paramount to the mortgage executed by Germain to Davis; that a special *fieri facias* issue; that if no sufficient property of the defendant, Germain, be found to satisfy the judgment, interest, and costs of suit, then, that the building and ground be sold to satisfy the same; and that Davis and certain other defendants "be forever barred and foreclosed of and from all equity of redemption and claim in and to the said hereinbefore described premises, and every part thereof."—*Record*, 18, 19.

From this judgment and decree, the defendant, Davis, appealed to the Supreme Court of the Territory of Montana, and in that Court, on the 15th day of November, 1870, the said judgment and decree were substantially affirmed.—*Record*, 25.

On the 21st day of November, 1870, as appears in the record, (*p.* 70,) "the said defendant and appellant, A. J. Davis, filed with the clerk of said Supreme Court of Montana Territory, his undertaking on the appeal of said cause to the Supreme Court of the United States." (*Record*, 34.) And, on the same day, the Chief Justice of the Supreme

Court of the Territory duly approved the said "undertaking on bond on appeal to the Supreme Court of the United States."—*Record*, 35.

The case is thus brought to this Court, to reverse the judgment and decree of the Court below.

ASSIGNMENT OF ERRORS.

1. The action in this case entirely ignores all distinctions between common-law and chancery proceedings. It joins in one suit, an action of assumpsit to recover for work and labor, with a chancery proceeding to foreclose equities of redemption, to decree the sale of incumbered realty, and to determine the priorities of equitable liens. The "decree" renders and enforces a judgment as at law, and also grants relief as in equity.

2. The decree enforces the claim of a mechanic for a statutory lien, in favor of the assignee thereof, in a suit brought in the name of the assignee.

3. The decree gives priority to the lien claimed by the plaintiff, Bilsland, and others, for labor on the building, over the prior mortgage of the defendant, Davis.

BRIEF OF ARGUMENT.

I.

The "Civil Practice Act" of Montana Territory, approved December 23, 1867, in force when this suit was instituted and determined, contains, among others, the following sections:

"SECTION 1. There shall be in this Territory, but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs.

"SEC. 2. In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant."

"SEC. 38. The only pleadings on the part of the plaintiff, shall be the complaint, demurrer, or replication to the defendant's answer; and the only pleadings on the part of the defendant, shall be a demurrer to the complaint, or a demurrer to the replication, or an answer to the complaint." * * *

The Legislative Assembly of the Territory of Montana evidently attempted by this legislation, to abolish all distinctions between actions and proceedings at law and in chancery, notwithstanding the organic act of the Territory, approved May 6, 1864, (13 *Statutes*, 85,) expressly provides that the Supreme and District Courts of Montana shall possess chancery, as well as common-law, jurisdiction, and that all laws of the United States which are not locally inapplicable, shall have the same force and effect within that Territory as elsewhere in the United States. And this suit was commenced, and prosecuted to "judgment and decree," in pursuance of the provisions of this act of the Territorial Assembly, whereby legal and equitable claims were blended together, the cause conducted partly as an action at law, and partly as a proceeding in equity, and a judgment, as at law, and a decree, as in chancery, passed in the same suit.

This was clearly error, for which the judgment and decree below must be reversed, according to the repeated rulings of this Court.—Dunphey *vs.* Kleinsmith, 11 *Wallace*, 610; Robinson *vs.* Campbell, 3 *Wheaton*, 212; Noonan *vs.* Lee, 2 *Black*, 509; Bennett *vs.* Butterworth, 11 *Howard*, 674; Payne *vs.* Hook, 7 *Wallace*, 430.

II.

So much of the statute of Montana securing liens to mechanics and others, to which we have referred, as is deemed necessary to the decision of this case, is presented below:

"SEC. 1. Every mechanic, builder, artisan, workman, laborer, or other person, who shall do or perform any work or labor upon, or furnish any materials, machinery, or fixtures, for any building, erection, or other improvement upon land, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor, or sub-contractor, upon complying with the provisions of this act, shall have for his work or labor done, or materials, machinery, or fixtures furnished, a lien upon such building, erection, or other improvement, and upon the lot or lands belonging

to such owner or proprietor on which the same is situated." * * *

"SEC. 8. The liens for work or labor done, or things furnished, as specified in this act, shall have priority in the order of filing the accounts thereof, as aforesaid, and shall be preferred to all other liens and incumbrances which may be attached to or upon the building, erection, or other improvement, and to the land upon which the same is situated, to the extent aforesaid, or either of them, made subsequent to the commencement of said building, erection, or other improvement."

"SEC. 9. The entire land, to the extent aforesaid, upon which any such building, erection, or other improvement is situated, including as well that part of said land which is not covered with such building, erection, or other improvement, as that part thereof which is covered with the same, shall be subject to all liens created by this act, to the extent, and only to the extent, of all the right, title, and interest owned therein by the owner or proprietor of such building, erection, or other improvement, for whose immediate use or benefit the labor was done, or things were furnished." * * *

"SEC. 10. The liens aforesaid, or work, shall attach to the buildings, erections, or improvements for which they were furnished, or the work was done, in preference to any prior lien or incumbrance, or mortgage, upon the land upon which said buildings, erections, or improvements have been erected or put; and any person enforcing such lien may have such building, erection, or improvement, sold under execution, and the purchaser may remove the same within a reasonable time thereafter."

The plaintiff, Bilsland, sued for, and prosecuted, in his own name and right, the claim for lien which had been assigned to him by McKillican. The Court gave the plaintiff judgment for the amount of the claim, and decreed the enforcement of the judgment, by directing a sale of the real estate upon which the lien had been filed by the assignor.

This was error. The lien was not assignable, so as to enable the assignee to prosecute the claim in his own name, and avail himself of the lien given to mechanics by the statute. There is nothing in the laws of Montana making such liens assignable. The statute of that Territory gives to the mechanic who performes the labor, the right to a lien It provides that, in pursuance of a contract, *he* may file his notice of lien, "and contemplates,

through all its provisions, that *he* is the one to avail himself of the privileges which it gives." It is the settled rule, too, that a lien of this sort is a personal right, and cannot be transferred or assigned.—Caldwell *vs.* Lawrence, 10 *Wisconsin*, 331; Pearson *vs.* Tincker, 36 *Maine*, 384; Fitzgerald *vs.* First Presbyterian Church, 1 *Michigan*, (*N. P.*,) 243; Rollin *vs.* Cross, 45 *New York*, 766; Roberts *vs.* Fowler, 4 *Abbott's Prac. R.*, 263.

III.

As has been seen, the mortgage from Germain to Davis, was executed, delivered and recorded on the 9th day of June, 1869, and Bilsland did not enter into his contract, or commence work on the hotel, until the 16th day of July, 1869.

The lien of the mechanic, under the statute, we submit, takes its inception from the date at which he commences the work. The language, "commencement of said building," employed in the 8th section of the act, evidently means, and was intended to mean, the commencement of work on the building, under a contract, by the mechanic claiming the lien, and not the commencement of the building by other mechanics, under other and different contracts.

Would it not be an intolerable hardship to give to the statute such a construction as to subordinate the lien of a mortgagee upon the land, to that of a mechanic who after the recording of the mortgage, entered into a contract with the morgagor, under which he performed labor upon an unfinished building on the land covered by the mortgage, which building had been commenced by some other mechanic? And this is just what the Court below did, in this case.

The statute itself, to our view, furnishes an unanswerable argument against so unreasonable and unjust a construction as that to which we have referred, by providing in the 9th section, that the liens of mechanics shall bind

the land "to the extent, and only to the extent, of all the right, title and interest *owned therein* by the owner or proprietor of the building."

When the owner of the land executes and delivers a mortgage thereon, the only interest he has in the property, is what remains after the mortgage debt has been satisfied.

In this case, the Chief Justice of the Supreme Court of Montana dissented from so much of the decision of that Court as gave priority to the liens of the plaintiff and others over the mortgage held by Davis. His dissenting opinion will be found on page 31 of the record, and is in the following words:

"I respectfully dissent from so much of the foregoing opinion as relates to the question of priority of Davis' mortgage over the several liens established. The contracts under which the different claimants performed labor or furnished material, were entirely separate and distinct, one from the other; and, in my opinion, the priority of each must be determined by the date at which he himself commenced to fulfill his contract, and not by the commencement of some other work under another contract, by another person, on the same building. The statute contemplates the completion of the building, or erection under one contract; and, in that event, gives preference over any incumbrance made subsequent to the commencement of the building or erection, but does not relate to several contracts, each of which is made with reference to incumbrances as they exist at the time of commencing to fulfill them respectively."

The above dissenting opinion of the Chief Justice contains a concise and clear exposition of the statute in question; and the construction which he gives to its provisions respecting the priority of liens, is obviously the true one. The Court, therefore, erred in decreeing that the said liens were prior and paramount to the mortgage executed by Germain to Davis.

We submit, that for the errors aforesaid, the judgment and decree of the Supreme Court of Montana should be reversed.

ROBERT LEECH,
ENOCH TOTTEN,
For Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1873.

ANDREW J. DAVIS, Plaintiff in Error,
vs.
JOHN BILSLAND, Defendant in Error. } No. 141.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

Brief of Defendant in Error.

STATEMENT.

This is a writ of error to a "decree" of the Supreme Court of Montana, adjudging that a "mechanic's lien" established in favor of Bilsland, defendant in error, for $2,064 74, upon the building and premises known as the International Hotel, in the town of Helena, owned by G. Jules Germain, was "prior and paramount" to a certain mortgage upon the same property, executed by Germain to Davis, the plaintiff in error. (Rec., p. 25.)

The *Mechanics' Lien Law* of this Territory is chapter XL of the compiled General and Miscellaneous Laws. (See Laws of Montana, Codified Statutes, 1871–'72, p. 508, *et seq.*)

Every mechanic or other person, performing any work upon, or furnishing any materials for, any building, acquires a lien on such building, and the land on which it is situated, to the extent of the interest therein of the owner

of the building, to secure the payment of such work or materials, upon filing with the recorder of the county, within sixty days after the work shall have been performed or materials furnished, a true account of the demand, verified by affidavit, containing a correct description of the property to be charged with such lien. (Secs. 1, 6, 9.)

The liens have priority in the order of filing the accounts, and are preferred to *all other* liens and incumbrances attached to the building and land "made *subsequent* to the *commencement* of the work on the erection of said building or other improvement." (Sec. 8.) And they attach to the buildings, in preference to any "prior lien upon the land upon which said buildings have been erected." (Sec. 10.) Suit to enforce a lien must be commenced within six months from the time of filing the account. (Sec. 20.) The method of foreclosing the lien is by suit in the district court of the proper county. (Sec. 11.)

The petition is required to "allege the facts necessary for securing the lien, and a description of the property charged therewith." (Sec. 12.)

The parties to the contract, and "*all other persons interested in the matter in controversy, and in the property charged with the lien*," may be made parties; and such as are not made made parties are not bound by the proceedings. (Sec. 13.)

The court ascertains by trial, in the usual way, "the amount of indebtedness for which such lien is established," and renders judgment for the same. (Sec. 15.)

If the debtor has not been served with summons, and has not appeared, though notified by publication, the judgment for the lienor is that "*he recover the amount of indebtedness found to be due, to be levied out of the property charged with the lien thereof, which property shall be correctly described in said judgment.*" (Sec. 17.)

If the debtor has been served with summons, or appears, the judgment is against him, "with the addition that if no sufficient property can be found to satisfy the judgment,

then the residue thereof be levied" out of the property charged with the lien. (Sec. 18.)

The execution is a special *fieri facias*, in conformity with the judgment. (Sec. 19.)

Under this statute, Bilsland, defendant in error, having perfected a lien for work on the International Hotel, owned by G. Jules Germain, and having acquired the claim and right of another lien creditor of Germain, (W. D. McKillican,) instituted proceedings for the purpose of foreclosing these liens, making, (as required by the statute,) Germain, the owner, certain persons who held other mechanics' liens on the property, and one Davis, the plaintiff in error, defendants in that proceeding.

The bill alleged that the building was commenced on or about May 15, 1869. (Rec., p. 2.)

Germain and Davis alone appeared and answered. (Rec., pp. 7, 10.) The other defendants, lien-holders interested in the same property, it seems, were defaulted. (Rec., p. 18.) Davis claimed an interest in the property as mortgagee, under a mortgage alleged to have been executed June 9, 1869. (Rec., p. 7.)

The complainant and defendants, Germain and Davis, waived a jury, and the case was tried by the court. (Rec., pp. 14, 16.) The record, however, does not show that the stipulation waiving a jury was made in *writing*.

After hearing the evidence the court made a finding of the facts of the case. (Rec., p. 16.)

On April 13, 1870, the District Court rendered a "*decree*," adjudging complainant entitled to a lien on the land for the amount of the judgment rendered against Germain, and ordering a special *fieri facias*, to be levied on the land charged with the lien, if no sufficient property of Germain should be found to satisfy the judgment. The court further ordered that all the defendants, (with certain exceptions,) and all persons having liens or mortgages on the

premises subsequent to the lien of the complainant, be barred and foreclosed of all equity of redemption and claim in and to the premises. (Rec., p. 18.)

Davis appealed from this decree, so far as it related to him, to the Supreme Court. (Rec., p. 23.)

That court substantially affirmed the decree, and ordered that Bilsland's lien "be decreed to be prior and paramount to the mortgage executed by appellant Germain to appellant Davis, mentioned in the answer of said Davis." (Rec., p. 25.)

To this judgment or decree Davis sued out the present writ of error.

First Point.

The present case being a proceeding in equity, brought here by writ of error, and not by appeal, the writ must be *dismissed*.

I. It is evident the statute of Montana confers a jurisdiction, and prescribes a proceeding to enforce and foreclose these mechanics' liens, which are essentially and characteristically of an equitable nature. The proceeding is a chancery proceeding, and in the nature of a foreclosure of a mortgage.

It is only necessary to glance at the decree to discover that it has no features of a suit at law.

(*a*) It was regarded as a proceeding in equity by the Supreme Court of the Territory, in the opinion which disposed of this cause. (Rec., p. 27.) Similar proceedings, authorized by several of the States, to enforce this species of statutory liens, have been uniformly held to be essentially chancery causes.

Chief Justice Daly, in a late New York case, said: "The foreclosure of a lien, whether it arises under the mechanics' lien law or otherwise, is a matter of equitable jurisdiction. It is an equitable, as contra-distinguished from a legal, remedy; and in the course of procedure, whether it

relates to the pleadings, the mode of trial, the evidence, or the remedy, is in accordance with courts of equity, except so far as it has been modified in this State by statute." (Hubbell *v.* Schreyer, 14 Abb. N. S., 284, cited in Guernsey's Mechanics' Lien Law, p. 4.)

The New York statutes appear to be very similar to this Montana statute. Woodruff, J., said: "In administering this law, we are acting peculiarly as a court of equity. The statute is itself ostensibly founded in equity." (Doughty *v.* Devlin, 1 E. D. Smith, 644.) Hence it was held, that the *form* of the judgment should be the same as a decree in *other* equity cases. (Randolph *v.* Leary, 3 E. D. Smith, 637; Althause *v.* Warren, 2 *ib.*, 657; 14 Abb. N. S., 284.) And the entire proceedings to foreclose mechanics' liens are assimilated, in the practice of the New York courts, to cases in equity.

So in New Jersey it was said by Vrendenburgh, J.: "*Quo ad hoc*, the filing of the lien is a bill in chancery. The complainant makes all persons parties against whose estates he intends to enforce the lien of his mortgage. * * This statute (the mechanics' lien law) gives to the plaintiff a right to file his *lien* or *bill in equity*, if we choose to call it so, against the estate either of the original owner or a subsequent purchaser or incumbrancer under him." (Edwards *vs.* Derrickson, 4 Dutcher, 61.)

Congress has expressly provided for the District of Columbia that the proceeding to enforce mechanics' liens shall be by bill in chancery.

(*b*) It is clear that, under the statute of Montana, a party, even the original contractor, could not obtain any *personal judgment* for the amount of his debt in the proceeding to enforce a lien, if he failed to establish the lien. The court can render a judgment only for "*the amount of indebtedness for which the lien is established.*" (Sec. 15.) No personal judgment whatever can be rendered where the owner of the realty has been notified by publication, and has not appeared. In that case the proceeding is purely *in rem.* (Sec. 17.) When the owner appears, the personal judgment

is merely auxiliary or ancillary or incidental to the judgment *in rem*. The amount which cannot be collected on the special *fieri facias* from the owner, is to be "levied out of the property charged with the lien," (secs. 17, 18,) upon the same special writ. The sole object of the proceeding is to enforce the lien. The decisions are numerous in New York that, if the lien fails, no personal judgment can be obtained in the special proceedings. (Grant *v.* Vandercook, 57 Barb., 165; Barton *v.* Herman, 8 Abb. N. S., 404.)

(*c*) But if a clear and independent personal judgment were authorized, it would not deprive the proceeding of its essential character and quality as a suit in equity. In mortgage cases, such judgments are common incidents. (Walker *v.* Dreville, 12 Wall., 442.)

Where a direct proceeding in equity will save time, expense, and a multiplicity of suits, and settle finally the rights of all concerned in one litigation, the remedy may be in equity, although a suit at law would lie for the same cause of action. (Oelrichs *v.* Spain, 15 Wall., 228.)

The right here sought to be enforced by the plaintiff below never existed at law; and, of course, he could have no remedy at law.

The enforcement of liens is one of the most ordinary subjects of equity jurisdiction. (1 Story Eq. Jur., sec. 506; Cincinnati *v.* Morgan, 3 Wall., 276.) If no special proceeding had been provided, a court of equity would have taken jurisdiction, for the purpose of rendering the security available.

II. A cause which is in its nature and objects a suit in equity, must come here from this Territorial Court, as from a Circuit Court, by appeal, and not writ of error. (Organic act, May 26, 1864, sec. 9, 13 Stats., 88.)

The laws or practice of the Territory cannot regulate the process by which this court exercises its appellate power. (Brewster *v.* Wakefield, 22 How., 128; McCollum *v.* Eager, 2 How., 61; Walker *v.* Dreville, 12 Wall., 442; Surgett *v.* Lapice, 8 How., 66.)

The case of Dunphy *v.* Kleinsmith, (11 Wall., 610,) treated by this court as a chancery proceeding, came here by *appeal.*

III. The present case was tried by the District Court as a chancery cause, and the decree was rendered on the facts found by the court itself.

IV. The power of the Territorial Legislature to give this lien and prescribe the method by which it shall be judicially enforced in the courts, cannot be questioned. By sec. 6 of the Organic Act the legislative power extends "to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act."

In a Territory, where the distinctions between the forms of pleading at law and in equity are abolished, the essential character of the subject matter of a given jurisdiction must furnish the criterion to determine the nature of the case, for the purposes of the jurisdiction of this court.

Second Point.

If the case is properly here by writ of error, the plaintiff in error is concluded by the judgment or decree of the court below, under the decision of this court in *Kearney* v. *Case*, 12 Wall., 283.

The record shows no *written* stipulation waiving a jury trial, and no request by the parties for a finding by the court of facts essential to a review of the action of the court below by this tribunal, and no request for rulings on propositions of law, and no bill of exceptions—nothing, indeed, required by the Act of March 3, 1865, in order to entitle the party to a review in this court of any question in the case.

The principle settled in *Kearney* v. *Case* (*supra*) is, that "where there is no evidence that the case was submitted in writing under the statute, but the record shows affirmatively (as it does here) that the parties waived a jury, such

evidence of waiver is sufficient to support the judgment, but not sufficient to authorize a review of the rulings of the court at the trial. * * * If the parties who consent to waive a jury desire to secure the right to a review in the Supreme Court of any question of law arising in the trial, they must *first* file their written stipulation, and must then ask the court to make a finding of such facts as they deem essential to the review, and ask the ruling of the court on points to which they wish to except. If this is not done, the parties consenting to waive a jury stand, as they did before the statute, concluded by the judgment of the court on all matters submitted to it." (12 Wall., 283.)

The questions of law, therefore, under the statute of Montana, presented in the brief of the plaintiff in error, do not arise on this record.

But, if the court should consider them, we submit it is clear that the views stated in that argument are not maintainable.

Third Point.

As to the right of Bilsland to take proceedings, in his own name, as assignee of the claim and lien of McKillican, to foreclose that lien, (though the question is not properly raised in this record,) we submit that, although it may be true that an assignee of a debt for work and materials cannot *file the account or notice* with the Recorder of the county in his own name, under the 6th section, and thereby *create* a lien, yet that after the account or notice has been filed by the original creditor, in *his* name, and the lien has been thus created, a subsequent assignee may take proceedings to *foreclose* the lien, the same as an assignee of any other chose in action.

The 4th sec. of the Civil Practice Act of Montana provides that actions shall be prosecuted in the name of the real party in interest. (Laws of Montana, codified, p. 28.)

In this case McKillican filed his notice with the recorder on the 17th of November, 1869, and thus got the lien in his own name and right. *Afterwards*, on the 20th of No-

vember, he assigned his account and lien to the plaintiff.

In New York, the decisions held that the assignee of a debt for work, etc., under an assignment made *before* notice of lien filed by the assignor, cannot acquire a lien by *filing* notice in his own name, but that *after* notice has been filed by the creditor, and the lien created, an assignee may take proceedings in his own name to foreclose the lien. (Hallahan *v.* Herbert, 11 Abb. N. S., 326.)

In *Roberts* v. *Smith*, (3 Abb. P. R., 635,) and *Rollins* v. *Cross*, (45 N. Y., 706,) cited by plaintiff in error, the question, merely was as to the right of an assignee of a claim for work and materials to *file* the notice, and thereby create a lien under the statute; and the court held that the right to *create* the lien could not be transferred.

In this sense the act gives a personal right; but after it has been acquired, it may be assigned, like any other right, and will pass as a legal security under an assignment of the original debt.

FOURTH POINT.

The question whether Bilsland's lien is paramount to Davis's mortgage, like the preceding question, is not presented, in any proper way, in this record for review upon this writ of error.

It is said by counsel to be a mortgage dated June 9, 1869; but if it were, and were valid and effectual from that date between the parties, as the building was commenced on May 15, and as, under the 8th section of the Montana act, *all* liens of mechanics are *expressly* preferred to all other liens or encumbrances attached to the building, "made *subsequent to the commencement* of the work on the erection of said building or other improvement," we perceive no room to question that Bilsland's mechanics' lien is paramount to Davis's mortgage. A law so plain as this needs no construction. He who runs may read. The language is the same as that of the Pennsylvania act of 1836, which dates the lien from the time of commencing

the building. (Pennock *v.* Hoover, 5 Rawle, 307.) By the 10th section, the liens attach to the building, in preference even to a *prior* encumbrance or mortgage upon the land.

The liens, when acquired by filing the accounts, date back to the commencement of the building. This was the manifest policy of the statute, which was intended to protect a favorite and meritorious class of creditors in this new and distant territory, where the labor and materials of the skilled mechanic were the one thing needful for public prosperity.

FIFTH POINT.

The writ of error should be dismissed; otherwise the decree should be affirmed.

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N. WILSON,
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